

Should There Be an Essential Facility Doctrine?

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The “essential facility” doctrine¹ provides an interesting example of the dilemma posed by modern economically-oriented antitrust policy. The doctrine, which has taken various forms, applies when a firm or a group of firms controls access to something “essential” for competition in a particular market. If a court finds access to be essential, denial of access to that “essential facility” may be illegal. Courts have invoked the concept in industries ranging from railroads to fruit and vegetable wholesaling to telecommunications to professional sports.² It is thought to have originated in *United States v. Terminal Railroad Association*,³ in which the Supreme Court required Jay Gould and others who maintained effective control over railroad bridges that crossed the Mississippi River to provide access to any competitors who wished to cross.

Recently, essential facility as a theory of antitrust liability has be-

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¹ The essential facility concept has been identified in various circuit and district court cases. See cases cited *infra* notes 15-40; see also P. AREEDA & D. TURNER, ANTITRUST LAW 564-609 (Areeda & Hovenkamp Supp. 1987) [hereafter AREEDA & HOVENKAMP] (Note that prior to the supplement, the Areeda and Turner treatise did not specifically discuss the doctrine.); Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395 (1986); Travers, *Does a Monopolist Have a Duty to Deal with Its Rivals? Some Thoughts on the Aspen Skiing Case*, 57 U. COLO. L. REV. 727 (1986); Note, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 COLUM. L. REV. 441 (1983) [hereafter Note, *Unclogging the Bottleneck*].

² See, e.g., *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 897 (1983); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir. 1952); see also Boudin, *supra* note 1, at 398-99.

³ 224 U.S. 383 (1912).

come popular.⁴ Various circuit decisions have addressed the theory directly with differing tests, analyses, and results. The Supreme Court, however, has never provided an appropriate essential facility analysis.

Denial of access to an essential facility resembles a typical antitrust violation, but the precise basis for liability remains clouded. The antitrust laws seek to impede the efforts of firms to obtain or maintain market power;⁵ market power is considered undesirable principally because it enables the possessor to charge high prices and reduce output in an economically harmful manner.⁶ The market power that results from denial of access to an essential facility, however, varies with the circumstances; chances that a denial will increase or maintain power often are not great. While a denial may inefficiently reduce output and misallocate resources without increasing or maintaining the facility's power, harmful output reduction has yet to be identified as a premise for the doctrine.

The essential facility doctrine raises a problem for proponents of efficiency-based antitrust enforcement. The dilemma is whether to confine antitrust focus to activities that increase or maintain market power, or to expand the focus to all economically harmful monopoly behavior, including output reduction. Should courts prohibit a denial of access only when the denial increases or maintains the facility's market power? Or should courts prohibit all denials that result in an inefficient allocation of resources, regardless of the denial's effect on the facility's power? The narrow focus would probably undermine the need for an essential facility doctrine. The expansive focus might significantly reduce inefficient monopoly behavior, but would probably cast the judiciary into the uncomfortable role of a regulator. Those who view competition as synonymous with allocative efficiency⁷ should not automatically dismiss the expansive focus, especially if their goal is to use the antitrust laws to enhance efficiency rather than to use efficiency

⁴ See cases cited in Part I of this Article (virtually all decided after 1980).

⁵ See, e.g., L. SULLIVAN, *ANTITRUST* §§ 7-8, at 29-33 (1977); see also United States Department of Justice Merger Guidelines 2 (1984) [hereafter DOJ Merger Guidelines].

⁶ See F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 9-44 (2d ed. 1980).

⁷ See, e.g., R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 91 (1978); R. POSNER, *THE ECONOMICS OF JUSTICE* 92-94 (1976); Easterbrook, *The Limits of Antitrust*, 63 *TEX. L. REV.* 1, 24 (1984); Easterbrook, *Workable Antitrust Policy*, 84 *MICH. L. REV.* 1696 (1986); see also Hovenkamp, *Antitrust Policy After Chicago*, 84 *MICH. L. REV.* 213 (1985); Markovits, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 *TEX. L. REV.* 41 (1984).

criteria to support judicial noninvolvement in business activity.

This Article examines the essential facility problem and its role in antitrust law. Part I reviews the development of the doctrine and discusses the limits of the support for the doctrine.⁸ Part II employs an essential facility example and analyzes the economic implications of access denial.⁹ In Part III the Article draws on the possibilities for economic harm demonstrated in Part II and evaluates whether the doctrine should be limited, expanded, or eliminated.¹⁰ Finally, Part IV discusses the advantages and difficulties inherent in turning the doctrine into a limited rule proscribing welfare-harmful output reduction by an essential facility.¹¹ The overall analysis suggests that:

(1) The relevant Supreme Court cases and the analysis by commentators that have been used as support for a broadly applied essential facility doctrine have been misinterpreted and do not strongly support a broad doctrine;

(2) The economic effects of access denial to an essential facility indicate that denial, though it often may not increase or maintain market power, may still represent a harmful monopolistic exercise of power;

(3) Proposed limits on the doctrine that would confine it to denials depriving competitors access to the facility, or to collusive denials agreed to by several horizontal competitors who jointly own the facility, do not significantly implement the doctrine;

(4) Probably the only adequate remedy for the essential facility problem is one that would force the judiciary to regulate the prices charged by the facility for access;

(5) Despite the troubling role the judiciary might be forced to adopt, the economic values underlying antitrust enforcement support development of the essential facility doctrine so that it would require access when a denial is economically harmful.

I. DEVELOPMENT OF THE ESSENTIAL FACILITY DOCTRINE

“Essential facility” as “doctrine” is a fairly recent phenomenon in antitrust history. Appellate court decisions articulate the doctrine, extrapolating the concept from Supreme Court decisions and legal commentary. Prior to using essential facility language, commentators iden-

⁸ See *infra* text accompanying notes 12-99.

⁹ See *infra* text accompanying notes 100-30.

¹⁰ See *infra* text accompanying notes 131-69.

¹¹ See *infra* text accompanying notes 170-226.

tified concepts called bottleneck,¹² public utility,¹³ and monopolist's duty to deal,¹⁴ which were derived from hard-to-categorize Supreme Court decisions. The gist of all of these concepts is the same: an owner of a crucial input cannot deny access if a firm seeking access cannot practicably obtain the input elsewhere. However, several potential limits on the doctrine have emerged.

A. Circuit Court Formulations of the Doctrine

In *Hecht v. Pro-Football, Inc.*¹⁵ the District of Columbia Court of Appeals squarely defined an essential facility doctrine and established a test for applying it. The essential facility was Robert F. Kennedy (RFK) Stadium. The plaintiff, who was seeking to become the owner of a new professional football team in Washington, D.C., proposed to lease the stadium for the team's home games.¹⁶ The stadium owner rejected the offer because a restrictive covenant in the stadium's lease with the Washington Redskins prohibited the stadium from renting to another professional football team. The court of appeals remanded for a new trial in part because the lower court failed to give a jury instruction concerning "the essential facility doctrine."¹⁷ The court held that Hecht was entitled to an instruction that the covenant constituted an unreasonable restraint of trade if the jury found that (1) use of RFK Stadium was essential to the operation of a professional football team in Washington; (2) the stadium could not practicably be duplicated; (3) another team could use the stadium without interfering with the Redskins' use; and (4) access was in fact denied because the covenant prevented potential competitors from sharing the stadium.¹⁸

In *MCI Communications v. American Telephone and Telegraph Co.*¹⁹ the Seventh Circuit articulated a test virtually identical to *Hecht's*

¹² A. NEALE, *THE ANTITRUST LAWS OF THE U.S.A.* 68, 131 (1960).

¹³ L. SULLIVAN, *supra* note 5, § 48, at 125-32.

¹⁴ Note, *Refusal to Deal by Vertically Integrated Monopolists*, 87 HARV. L. REV. 1720 (1974) [hereafter Note, *Refusal to Deal*].

¹⁵ 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

¹⁶ *Id.* at 992-93. Mr. Hecht had attempted to purchase an American Football League franchise for Washington, D.C., and RFK stadium was the logical place for the team to play.

¹⁷ *Id.*

¹⁸ *Id.* While the case was brought on a Sherman Act § 1 theory, positing an anticompetitive agreement between the Redskins and the operator of the stadium, the court indicated that even without an agreement, a single-firm controller of an essential facility would be held to the same standards under § 2. *Id.* at 993 n.44.

¹⁹ 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

in evaluating AT&T's refusal to interconnect MCI with the distribution facilities for AT&T's local operating companies. The refusal limited the kinds of long-distance service that MCI could offer to its customers.²⁰ The court concluded that AT&T's behavior was governed by the "so-called essential facilities doctrine" (but offered no clue as to who had "so-called" it),²¹ and provided a four element test for invoking the doctrine: (1) a monopolist controls the essential facility; (2) a competitor is unable practicably or reasonably to duplicate the essential facility; (3) access has been denied to a competitor; and (4) access is feasible. The existence of all four elements establishes an illegal restraint of trade.²²

Other courts have followed the lead of the Seventh and District of Columbia Circuits. In *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*²³ the Tenth Circuit used the *MCI* test to find that a multiday, multilocation lift ticket joint venture in the Aspen, Colorado ski area was an essential facility and that the facility owner had impermissibly denied access.²⁴ The Third Circuit cited the doctrine with apparent approval in *Mid-South Grizzlies v. National Football League*,²⁵ adding only that the theory assumes that admitting the excluded firm to the facility would improve competition.²⁶ Similarly, in *United States v. American Telephone and Telegraph Co.*²⁷ Judge Greene called the doctrine an "applicable legal standard."²⁸ The Seventh Circuit recently

²⁰ *Id.* at 1092.

²¹ *Id.* at 1132.

²² *Id.* at 1132-33. MCI was found to have produced sufficient evidence at trial for a jury to conclude that AT&T committed an "act of monopolization" by refusing to provide the requested interconnections. *Id.*

²³ 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985) (on non-essential-facility grounds).

²⁴ *Id.* at 1520-21. The plaintiff and defendant were ski resorts in the Aspen, Colorado area. The plaintiff wished to continue participation in the joint venture. *Id.* at 1512. The Supreme Court affirmed the decision on other grounds and specifically declined to evaluate the essential facility doctrine as a basis for liability. 472 U.S. 585, 600. In a footnote, the Court stated: "Given our conclusion . . . we find it unnecessary to consider the possible relevance of the 'essential facilities' doctrine[.]" *Id.* at 611 n.44.

²⁵ 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *see also* Garshman v. Universal Resources Holding, Inc., 824 F.2d 223, 230 (3d Cir. 1987) (discussing applicability of essential facility doctrine to noncompetitors).

²⁶ *Mid-South Grizzlies*, 720 F.2d at 787.

²⁷ 524 F. Supp. 1336 (D.C. Cir. 1981).

²⁸ *Id.* at 1352; *see also* Directory Sales Management Corp. v. Ohio Bell Tel., 833 F.2d 606, 612-13 (6th Cir. 1987) (discussing with approval the essential facility doctrine); Oahu Gas Serv., Inc. v. Pacific Resources, 829 F.2d 1471, 1476 n.4 (9th Cir. 1987) (stating that because defendant did not exclusively control resource, essential fa-

re-affirmed the essential facility doctrine in *Fishman v. Estate of Wirtz*,²⁹ upholding a district court finding that Chicago Stadium was an essential facility for a professional basketball franchise in Chicago and that denial of access to the stadium violated the Sherman Act.³⁰

1. Limitations on the Doctrine — Must the Victim Be a Competitor?

Courts have placed varying limits on the essential facility doctrine. Many courts require a finding that access is denied to a competitor (as distinct from noncompetitors who may desire access) before they will apply the doctrine.³¹ This limitation restricts the doctrine to facilities

cility doctrine would not apply); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 12 (1st Cir. 1987) (discussion and apparent approval of a limited essential facility doctrine); *Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 494-95 (4th Cir. 1986) (indicating that successful showing that a facility is essential requires definition of relevant market); *Consolidated Gas Co. of Fla., Inc. v. City Gas Co. of Fla.*, 665 F. Supp. 1493, 1532-39 (S.D. Fla. 1987); *Beverage Management, Inc. v. Coca-Cola Bottling Corp.*, 653 F. Supp. 1144, 1156-57 (S.D. Ohio 1986); *Driscoll v. City of New York*, 650 F. Supp. 1522 (S.D.N.Y. 1987); *United States Football League v. National Football League*, 644 F. Supp. 1040, 1048 (S.D.N.Y. 1986); *Century Air Freight, Inc. v. American Airlines*, 597 F. Supp. 564, 571-72 (S.D.N.Y. 1984); *Interface Group, Inc. v. Gordon Publications, Inc.*, 562 F. Supp. 1235 (D. Mass. 1983); *Florida Cities v. Florida Power & Light Co.*, 525 F. Supp. 1000, 1003, 1007 (S.D. Fla. 1981); *Robinson v. Magovern*, 521 F. Supp. 842, 913 (W.D. Pa. 1981), *aff'd*, 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982); *Venture Technology, Inc. v. National Fuel Gas Co.*, 1980-81 Trade Cas. (CCH) ¶ 63,780 (W.D.N.Y.) (providing an essential facility instruction to the jury), *rev'd*, 685 F.2d 41 (2d Cir. 1981), *cert. denied*, 459 U.S. 1138 (1982).

²⁹ 807 F.2d 520, 539-41 (7th Cir. 1986); *see also* *United Air Lines v. Civil Aeronautics Bd.*, 766 F.2d 1107, 1114 (7th Cir. 1985). In *United Air Lines* in the process of evaluating Civil Aeronautics Board Rules concerning airline computer reservation systems, Judge Posner described denial of access to an essential facility as a "traditional method" of illegal monopolization. *Id.*; *see also* *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986) ("[A] firm which controls a facility essential to its competitors may be guilty of monopolization if it refuses to allow them access to the facility."), *cert. denied*, 107 S. Ct. 1574 (1987).

³⁰ *Fishman*, 807 F.2d at 539-41.

³¹ *See, e.g., Garshman*, 824 F.2d at 230; *Massachusetts Port Auth.*, 816 F.2d at 12; *Fishman*, 807 F.2d at 539; *Olympia Equipment*, 797 F.2d at 376; *MCI*, 708 F.2d at 1131, 1147 n.100. Similarly, while not couching the issue in essential facility terms, the Second Circuit found that the Official Airline Guide was not required to provide access to a customer who was not a competitor. *Official Airline Guide, Inc. v. FTC*, 630 F.2d 920, 927-28 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981). The FTC had not found it necessary for the denial to be to a competitor in order to grant relief. *Id.* at 926-27. *But see* *Grand Caillou Packing Co.*, 65 FTC 799, 868-69 (1964) (separate

that are vertically integrated and compete with the firm that is denied access.³² It also tends to channel the doctrine into a vertical foreclosure or leverage issue — the idea that the owner of the facility can increase total market power by “leveraging” the facility’s power into a different market.³³ The motivation for this limitation probably is that a denial to noncompetitors does not appear to give the facility owner any competitive advantage and thus does not seem to be an exclusionary act.³⁴

2. Limitations — Must Access Denial Be Pursuant to Agreement?

Some circuits have suggested that the doctrine should apply only to facilities jointly owned by several competitors, and not to essential facilities owned by a single firm. While the Seventh Circuit had no qualms about applying the doctrine to AT&T (single firm),³⁵ the Second Circuit apparently would restrict the doctrine to concerted activity among the owners.³⁶ The Sixth Circuit is not fully consistent on the issue,³⁷ and even circuits that seem willing to apply the doctrine to a single firm often focus on the agreement aspects of denial.³⁸ The limitation

opinion of Commissioner Elman) (suggesting that finding of harm to competitor was not necessary for § 5 FTC Act violation), *aff’d in part, rev’d in part sub nom. LaPeyre v. FTC*, 366 F.2d 117 (5th Cir. 1966). The Fifth Circuit upheld the portion of the FTC decision concerning the denial to a noncompetitor. *LaPeyre*, 366 F.2d at 121-22; *see also AREEDA & HOVENKAMP, supra* note 1, at 586, 597-603 (arguing that only competitors denied access should be allowed to use the doctrine to seek access); Note, *Unclogging the Bottleneck, supra* note 1, at 453-54, 472-73.

³² The facility may have an upstream component (for example, a stadium) and a downstream component (for example, a professional sports team that uses the stadium). The downstream component will compete with other teams that desire access to its stadium; thus, denial of access will be to a competitor.

³³ *See infra* text accompanying notes 131-77.

³⁴ *See AREEDA & HOVENKAMP, supra* note 1, at 597-603. On the other hand, many cases have been brought by victimized competitors, so the courts did not have to grapple with the issue of a denial to a noncompetitor.

³⁵ *See MCI*, 708 F.2d 1081 (AT&T arguing that doctrine applied only to group owned facilities).

³⁶ *See Venture Technology, Inc. v. National Fuel Gas Co.*, 685 F.2d 41 (2d Cir.), *cert. denied*, 459 U.S. 1138 (1982).

³⁷ *See Directory Sales Management*, 833 F.2d at 612-13 (essential facility analysis, but in case involving conspiracy by more than one defendant); *Smith v. Northern Mich. Hosps., Inc.*, 703 F.2d 942, 953 (6th Cir. 1983) (indicating that essential facility doctrine is limited to facilities owned by groups of horizontal competitors); *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 856 n.33 (6th Cir. 1979) (suggesting that the limitation to concerted activity may not be wise).

³⁸ *See, e.g., Fishman*, 807 F.2d at 540-44 (describing district court decision as finding concerted refusal to deal and analyzing case as group boycott); *Hecht*, 570 F.2d at

would confine the doctrine to collusive activity; the rationale is that, unlike single-firm facilities, group ownership creates a horizontal agreement to deny access in restraint of trade.³⁹

3. Reasonableness Rather Than the Doctrine

Finally, some circuits, despite opportunities to adopt an essential facility doctrine, have opted instead for a more rule-of-reason oriented approach. The Fifth Circuit, for example, went out of its way to avoid adopting a general essential facility doctrine. Instead it stressed illegal group activity and facial unreasonableness concerning a refusal by the membership of a real estate brokers association to allow certain non-member brokers to have access to its real estate multiple listing service.⁴⁰

B. Does Support for a General Essential Facility Doctrine Exist?

The circuit-generated essential facility doctrine draws on Supreme Court decisions⁴¹ and accompanying legal commentary⁴² for support. A

993 n.44 (instruction to jury concerned only the § 1 violation). Areeda and Hovenkamp suggest that while the doctrine need not be limited to jointly owned facilities, imposing a duty to provide access to a facility is arguably more justified when the facility is controlled by a combination of competitors. *See AREEDA & HOVENKAMP, supra* note 1, at 569-72. Several sources have cited P. AREEDA & D. TURNER, *ANTITRUST LAW* (1976) as arguing that imposing the duty should be restricted to facilities controlled by a group of competitors. *See, e.g., Byars*, 609 F.2d at 856; Travers, *supra* note 1, at 738-39.

³⁹ When a jointly owned facility denies access, the denial is pursuant to an "agreement" by the firms that own the facility. Agreements among competitors to deny access to other competitors closely resemble group boycott activities that violate the antitrust laws. *See infra* text accompanying notes 131-80. No such agreement exists if a single-firm facility denies access.

⁴⁰ *See United States v. Realty Multi-List Inc.*, 629 F.2d 1351 (5th Cir. 1980); *see also Official Airline Guide, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981); *Byars*, 609 F.2d at 858 (describing "bottleneck theory" as requiring equal access if indispensable facility is controlled by group of competitors; also not adopting an essential facility theory, but remanding for determination of whether denial by wholesaler to distributor was unreasonable); *Town of Massena v. Niagara Mohawk Power Corp.*, 1980-82 Trade Cas. (CCH) ¶ 63,526 (N.D.N.Y. 1980); Note, *The Monopolist's Refusal to Deal: An Argument for a Rule of Reason*, 59 TEX. L. REV. 1107, 1126-30 (1981) [hereafter Note, *Monopolist's Refusal to Deal*] (describing lower courts' move toward rule of reason).

⁴¹ *E.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, *reh'g denied*, 411 U.S. 910 (1973); *Associated Press v. United States*, 326 U.S. 1 (1945); *Terminal R.R.*, 224 U.S. at 383.

⁴² A. NEALE, *supra* note 12; L. SULLIVAN, *supra* note 5.

review of the support, however, suggests that the decisions do not strongly justify a broad essential facility doctrine and that the commentators may have overstated the reach of those cases. The cases do provide a measure of support for the circuit courts' limitations on the doctrine.

1. Supreme Court Support

a. Terminal Railroad

Most judges and scholars trace the origin of the essential facility doctrine to the *Terminal Railroad* case.⁴³ At the turn of the century, twenty-four railroads wound their way into the very important railroad gateway of St. Louis. None of the railroads could afford to build its own bridge across the Mississippi River,⁴⁴ but two toll bridges were constructed and made available on an equal basis to all users willing to pay the toll. To preserve competition between the two bridges and among the railroad companies using them, the owners of each bridge were prohibited from owning stock in the other bridge.⁴⁵ Unfortunately, no provision regulated the ownership of the terminal railroad companies that connected to both sides of each bridge.⁴⁶ In 1889 Jay Gould and several railroad companies formed a joint venture agreement that ultimately acquired control of all of the terminal companies.⁴⁷ The joint venture agreement entitled each member railroad to veto use by non-member competitors.⁴⁸

By controlling the crucial facilities, the Terminal Railroad Association effectively maintained control over all railroad traffic crossing the Mississippi River in St. Louis. The city's topography and the river's location made constructing additional terminal facilities from the west

⁴³ *Terminal Railroad* has been cited by numerous authorities. See, e.g., *Aspen Highlands Skiing*, 758 U.S. at 1520; *Byars*, 609 U.S. at 856; *Consul*, 805 F.2d at 494 n.11; *MCI*, 708 F.2d at 1132; *Smith*, 703 F.2d at 953; *Hecht*, 570 F.2d at 992; *Beverage Management*, 653 F. Supp. at 1156; *Gordon Publications*, 562 F. Supp. at 1243; *Driscoll*, 650 F. Supp. at 1528; *American Tel. & Tel.*, 524 F. Supp. at 1352-53; see also Boudin, *supra* note 1, at 397; Note, *Unclogging the Bottleneck*, *supra* note 1, at 449-52.

⁴⁴ *Terminal R.R.*, 224 U.S. at 395.

⁴⁵ *Id.* at 392-93. The law was later rescinded.

⁴⁶ Few of the 24 railroads connected directly to either of the bridges or to each other. The terminal companies provided the crucial switching services to the roads that "fill[ed] in the gaps between the bridge ends and the termini of railroads on both sides of the river." *Id.* at 396.

⁴⁷ *Id.* at 391-96.

⁴⁸ *Id.* at 399-400.

virtually impossible, and no feasible substitutes for the bridges existed.⁴⁹ The Justice Department brought suit under sections 1 and 2 of the Sherman Act, claiming that the railroad competitors violated the Act by purchasing and consolidating all the various terminal companies.⁵⁰

The Supreme Court found that the Terminal Railway Association had restrained trade in violation of the antitrust laws as a result of the power obtained through the acquisitions and abuses of that power.⁵¹ Despite the violation, however, the Court perceived advantages in allowing the terminal companies to remain consolidated.⁵² Consequently, rather than breaking up the Association, the Court required that it offer membership and other access to the terminal to all nonmembers on "just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be."⁵³

Although *Terminal Railroad* is often considered the progenitor of the essential facility doctrine, significant facts severely constrain a conclusion that the case established the general essential facility concept articulated in later decisions by circuit courts. While the Association did control a facility essential for railroad competition, the case did not clearly establish a rule that an owner is not permitted to deny access to a facility if the facility is not duplicable and a firm needs access in order to compete.⁵⁴

First, the substantial coordination among the horizontal railroad competitors resembles a classic group boycott designed to injure other railroad competitors.⁵⁵ Accordingly, the Association's veto power provision can be viewed as an agreement among horizontal competitors designed to hurt other competitors, which is illegal under section 1 of the Sherman Act regardless of whether the terminal was an essential facility.⁵⁶ Second, under the Sherman Act the mergers were not illegal

⁴⁹ *Id.* at 392-96, 405.

⁵⁰ *Id.* at 390-91.

⁵¹ *Id.* at 406-09.

⁵² *Id.* at 405-06.

⁵³ *Id.* at 411.

⁵⁴ See Boudin, *supra* note 1, at 398-99 (arguing that *Terminal Railroad* is not necessarily an essential facility case); see also Travers, *supra* note 1, at 738-39. *But see* Note, *Unclogging the Bottleneck*, *supra* note 1, at 449 (calling *Terminal Railroad* the first essential facility case).

⁵⁵ A group boycott is a general category of agreements, usually by competitors (here, the terminal owners), to harm other horizontal competitors (here, the nonmember railroads). See *infra* text accompanying notes 150-58.

⁵⁶ In addition, all the members agreed not to use any other terminal company. The effect of this agreement would be to frustrate attempts to set up a competing terminal

unless they constituted monopolization or agreements in restraint of trade.⁵⁷ The purpose of the mergers was to enable one company to control all of the terminal facilities. That intent, combined with the success of the strategy, can be considered illegal monopolization under section 2. Alternatively, the mergers can be viewed as horizontal agreements in restraint of trade in violation of section 1. Thus, one can characterize the case as involving a monopoly illegally obtained through merger or horizontal agreement, rather than an illegal denial of access by a lawfully obtained essential facility.

Third, the remedy requiring access was not designed to be the obvious solution for a violation based on the denial of access. The Court sought to avoid divestiture rather than to adopt the denial aspect as a basis for liability. In fact, no denial of access was alleged or shown.⁵⁸ Despite the acquisition of power, the Court perceived benefits from a consolidated terminal system and devised a remedy that attempted to preserve the benefits while improving competition among railroads. If the Association failed to provide equal access, it was to be divested.⁵⁹

Fourth, the Court confronted an industry already regulated by the Interstate Commerce Commission,⁶⁰ and the requirement of fair, just, reasonable, and nondiscriminatory access was quite similar to the duties generally imposed on common-carrier railroads.⁶¹ Given the pervasive regulation of the industry, the Court may have simply chosen to parallel the existing regulatory scheme in tailoring a remedy. Similar treatment was not necessarily contemplated for nonregulated industries.

At best the case indicates that when: (1) several horizontal competitors (2) combine by merger in an attempt to control a facility, and (3) achieve that control, and when (4) access to the facility is crucial for firms trying to compete in a particular market or industry, (5) the facility is not duplicable, (6) the owners of the facility compete with non-

system. A terminal unable to guarantee switching to all railroads would not be attractive to potential connecting railroads and would be less likely to succeed. *Terminal R.R.*, 224 U.S. at 399-400.

⁵⁷ Antitrust legislation designed to deal specifically with mergers did not exist, because the suit was brought before the Clayton Act, 15 U.S.C. §§ 12-27 (1982), was enacted. Under modern interpretation of the Clayton Act the mergers likely would have been impermissible because they tended substantially to lessen competition.

⁵⁸ *Terminal R.R.*, 224 U.S. at 400.

⁵⁹ *Id.* at 411-12.

⁶⁰ In 1887 the Interstate Commerce Commission was established to regulate rail transportation. See generally P. MACAVOY, *THE ECONOMIC EFFECTS OF REGULATION* 110-92 (1965). In 1906 Congress gave the Commission broad powers, including the power to fix maximum rates.

⁶¹ See R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 211 (1976).

owners who seek access, and (7) the industry is already heavily regulated, then fair, just, reasonable, and nondiscriminatory access must be provided.

b. Associated Press

Associated Press v. United States,⁶² which has been cited as supporting the essential facility doctrine,⁶³ provides only limited support for a broad doctrine. The Associated Press (AP), a nonprofit cooperative of 1200 newspapers, enacted bylaws enabling each member to block or at least substantially impede any nonmember competitor seeking membership.⁶⁴ Combined with bylaws prohibiting members from selling AP-generated or other spontaneous news to nonmembers, the membership limitation effectively precluded access to AP news to nonmember newspapers that competed with members.⁶⁵ The Court found a restraint of trade and upheld a remedy requiring AP to eliminate the offensive bylaws.⁶⁶

Associated Press sheds little new light on the essential facility doctrine. The decision did identify the harm from deprived access and struck down the bylaws designed to frustrate access. But the case can also be considered as raising a horizontal agreement (group boycott) issue rather than one of essential facility. Like *Terminal Railroad*, the case involved joint activity and agreements by horizontal competitors that excluded downstream nonmember competitors by manipulating an upstream product (AP news service). Justice Black, writing for the majority, emphasized the horizontal agreement among competitors.⁶⁷ The fact that the Court did not predicate its decision and remedy on AP's achieving "a complete monopoly"⁶⁸ suggests either that the Court was not grappling with the issue of access to an essential facility or that characterizing a facility as essential correlates more with market power

⁶² 326 U.S. 1 (1945).

⁶³ See *Aspen Highlands Skiing*, 738 F.2d at 1519; *Mid-South Grizzlies*, 720 F.2d at 787; *Byars*, 609 F.2d at 856; *Consolidated Gas*, 665 F. Supp. at 1533; *Driscoll*, 650 F. Supp. at 1528; *Gordon Publications*, 562 F. Supp. at 1242; Boudin, *supra* note 1, at 399; Travers, *supra* note 1, at 738 n.34; Note, *Unclogging the Bottleneck*, *supra* note 1, at 451 n.65.

⁶⁴ *Associated Press*, 326 U.S. at 4, 9-10.

⁶⁵ *Id.*

⁶⁶ *Id.* at 21-23. The Court did not impose mandatory access for all competitors. *Id.* at 24 (Douglas, J., concurring).

⁶⁷ *Id.* at 14-19.

⁶⁸ *Id.* at 12-13, 17-18.

than with a complete absence of similar products or services.⁶⁹

c. Otter Tail

At most, *Terminal Railroad* and *Associated Press* support the essential facility doctrine only in the context of a facility that is jointly owned by horizontal competitors.⁷⁰ *Otter Tail Power Co. v. United States*,⁷¹ another case cited in support of the essential facility doctrine,⁷²

⁶⁹ The majority declined to find one way or another concerning "indispensibility." *Id.* at 18. The reference is to indispensibility regarding availability of the news service to the public, however, not to whether it was indispensable to the newspapers denied access. Two other news services, United Press and International News Service, did exist, *id.* at 13, but the opinion suggests that they were not adequate substitutes, pointing out that a newspaper without AP service was "more than likely to be at a competitive disadvantage." *Id.* at 18. The majority also cited with approval the lower court analysis, which described AP as having market power. *Id.* at 17 n.17. Thus, the majority came close to defining AP as essential. If newspapers could not effectively compete without AP, AP had power, even though some newspapers in some cities could survive without the service and regardless of the availability of similar services. The majority decision went out of its way, however, to say that finding a monopoly was not necessary to find AP's bylaws impermissible. *Id.*; see also *id.* at 28-29 (Frankfurter, J., concurring) (insisting that existence of other news agencies was irrelevant; bylaws that curtailed competition were "unreasonable because they offend[ed] the basic functions which a constitutionally guaranteed free press serves in our nation.").

It is worth noting that AP was nonprofit, and thus may not have desired to exploit any power it had by simply charging monopoly prices for its service, as that would have generated substantial profits. AP had substantial assets but declared no dividends. *United States v. Associated Press*, 52 F. Supp. 362, 364 (S.D.N.Y. 1943). The cooperative could have concluded that the most effective way to distribute monopoly profits was to exercise power through the downstream newspaper market. Denial of AP services to nonmembers that competed with member newspapers would give the members a significant, if not overwhelming, competitive edge. This is exactly what AP tried and ultimately was forbidden to do. AP may have been, in effect, skirting its nonprofit status.

⁷⁰ *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963), is another case that might support the essential facility doctrine in the joint-ownership context. In *Silver* access to an indirect wire to the New York Stock Exchange (NYSE) was denied to a broker on vague grounds. The Court indicated that access to current NYSE information may be essential for stock brokers and that the activity would be a group boycott were it not for the federally authorized self-regulatory nature of the industry. Denial of access without minimal procedural safeguards was found to be illegal.

⁷¹ 410 U.S. 366, *reh'g denied*, 411 U.S. 910 (1973).

⁷² See *Directory Sales Management*, 833 F.2d at 612; *Massachusetts Port Auth.*, 816 F.2d at 12; *Consul*, 805 F.2d at 494 n.11; *Olympia*, 797 F.2d at 376; *MCI*, 708 F.2d at 1133; *Byars*, 609 F.2d at 857; *Hecht*, 570 F.2d at 992-93; *Consolidated Gas*, 665 F. Supp. at 1533; *Beverage Management*, 653 F. Supp. at 1156; *Driscoll*, 650 F. Supp. at 1528; *Gordon Publications*, 562 F. Supp. at 1242; *American Tel. & Tel.*, 524 F. Supp. at 1352-53; Boudin, *supra* note 1, at 400; Note, *Unclogging the Bottleneck*,

involved a single firm denying access to an unambiguously essential input. Otter Tail Power Company, an integrated electric utility, generated, wheeled,⁷³ and retailed electric power. Rather than franchise Otter Tail to distribute power at the retail level, two municipalities preferred to purchase power wholesale from Otter Tail and distribute it themselves. When the utility refused to sell, the municipalities located another electricity wholesaler, but only Otter Tail had the ability to wheel the power, and Otter Tail refused to wheel.⁷⁴ The refusals apparently did not violate any federal electric power regulations; under the existing regulatory scheme, Otter Tail had no common-carrier duty to wheel.⁷⁵ The question was whether the refusals violated the antitrust laws. The majority upheld the district court's decree enjoining Otter Tail from, among other things, refusing to wheel power to existing or proposed municipal electric systems.⁷⁶

Otter Tail supports the idea that a single-firm controller of an essential facility must grant access to that facility if it has the ability to do so.⁷⁷ Like *Terminal Railroad and Associated Press*, however, the case provides only limited support for a broad essential facility doctrine.⁷⁸ First, Otter Tail was accused of several anticompetitive activities in conjunction with the refusal to wheel.⁷⁹ The Court did not identify the essential nature of the wheeling service (or unduplicability of the wheeling facilities) as a prerequisite to finding a violation or to man-

supra note 1, at 451.

⁷³ Wheeling is the process of moving electrical power, by direct transmission or displacement, from one utility to another. *Otter Tail*, 410 U.S. at 368.

⁷⁴ *Id.*

⁷⁵ Congress drafted but ultimately did not adopt Federal Power Act provisions that would have required all utilities to transmit energy upon reasonable request and would have authorized the Federal Power Commission (FPC) to order wheeling if necessary to promote "the public interest." *Id.* at 374. The FPC did have some power to impose involuntary interconnections (a physical connection of transmission facilities) in the public interest, but no authority to order wheeling. *Id.* at 375, 376 n.7.

⁷⁶ *Id.* at 382.

⁷⁷ The decision noted that the wheeling should not be required if it would impair Otter Tail's ability to provide service. *Id.* at 381.

⁷⁸ See Boudin, *supra* note 1, at 400; Note, *Unclogging the Bottleneck*, *supra* note 1, at 451.

⁷⁹ In addition to refusals to sell power wholesale and to wheel power, Otter Tail initiated litigation to halt or delay efforts by municipalities to establish independent municipal franchises. *Otter Tail*, 410 U.S. at 368. Further, it maintained transmission agreements with some cooperatives that the district court described as per se illegal territorial allocations. *Id.* at 378. The majority found Otter Tail's large number of municipal franchises to be significant, perhaps because it suggested that attempted monopolization of the retail markets was succeeding. *Id.* at 369-70.

dating access.⁸⁰ Second, the illegal monopolization called for a remedy. Requiring Otter Tail to wheel avoided the unthinkable — vertical or horizontal divestiture of a regulated utility that presumably had natural monopoly characteristics. Third, once again the Court was dealing with a regulated industry, and the refusal to wheel may have enabled Otter Tail to increase market power by skirting rate regulation.⁸¹ Outside the context of a regulated industry, similar access denials may not so clearly maintain or create new power.⁸² Finally, like its decision thirteen years later in *Aspen Highland Skiing Corp. v. Aspen Skiing Co.*,⁸³ the Supreme Court ignored the essential facility rationale of the lower court, which specifically based its decision on a “‘bottleneck theory’ of antitrust law . . . [a] theory reflect[ing] in essence that it is an illegal restraint of trade for a party to foreclose others from the use of a scarce facility.”⁸⁴

In sum, while several Supreme Court cases are supportive and are not inconsistent with an essential facility theory, none of the cases elucidates a specific theory of liability concerning an essential facility. The fact patterns of the cases implicate several prerequisites for applying the doctrine: (1) an integrated facility that denies access to its downstream competitors (from *Terminal Railroad, Associated Press*, and *Otter Tail*); (2) collusive activity by joint owners of a facility (from *Terminal Railroad and Associated Press*, but contrary to *Otter Tail* and *Lorain Journal Co. v. United States*⁸⁵); and (3) a facility already

⁸⁰ *Id.* at 377. The decision seems to reflect a leverage theory that Otter Tail was using its power at the wholesale and wheeling levels to gain a monopoly at the retail level. Alternatively, the case can be viewed as prohibiting Otter Tail’s efforts to maintain existing power at the retail level. *Id.* at 388 (Stewart, J., dissenting).

⁸¹ See, e.g., *Fishman v. Estate of Wirtz*, 807 F.2d 520, 572-73 (7th Cir. 1986) (Easterbrook, J., dissenting) (describing *Otter Tail* as regulatory evasion case).

⁸² See text accompanying notes 108-130 for a discussion of why denials outside the regulated industry context do not always maintain or create power. Another reason to be wary about extending *Otter Tail* beyond the regulatory context is that a regulatory structure, the FPC, already existed. Requiring the company to grant wheeling access is easier to swallow when a court can comfortably rely on a regulatory agency to implement or at least to provide examples for the pricing and service quality aspects of the relief. See Note, *Refusal to Deal*, *supra* note 14, at 1725.

⁸³ 472 U.S. 587 (1985). In *Aspen Highlands Skiing* the Supreme Court disposed of the case without discussing the lower court’s essential facility basis. See *supra* note 25.

⁸⁴ *United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 61 (D. Minn. 1971). The district court cited A. NEALE, *supra* note 12, at 67, as articulating the rule. The government brief to the Court raised the bottleneck theory directly. See Note, *Refusal to Deal*, *supra* note 14, at 1722-23.

⁸⁵ 342 U.S. 143 (1951). *Lorain Journal* supports not distinguishing between jointly owned and single-firm controllers of an essential facility. In *Lorain Journal* a monop-

regulated to some extent (from *Terminal Railroad* and *Otter Tail*, but contrary to *Associated Press*).

The fact patterns also suggest that the essential facility theory does not offer a unique theory of antitrust liability. Horizontal competitors are seldom allowed to combine in a method that could increase market power. While a determination of impermissible single-firm and regulated-firm behavior is somewhat more of an open question, using essential facility terminology does not obviously contribute to an appropriate resolution.

2. Legal Commentary Supporting the Doctrine

Neale,⁸⁶ who is frequently cited in support of the essential facility doctrine, describes bottleneck agreements and bottleneck monopolies⁸⁷ and concludes that if groups of competitors control a facility and "facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is an illegal restraint to foreclose the scarce facility."⁸⁸ He attempts to derive a generalized rule from *Associated Press*, *Terminal Railroad*, *Lorain Journal*, *Eastman Kodak v. Southern Photo Materials Co.*,⁸⁹ and *Gamco, Inc. v. Providence Fruit & Produce Building*,⁹⁰ but does not purport to describe a new theory of antitrust enforcement.

list newspaper attempted to eliminate a competitor radio station by, among other things, denying advertising in its paper to anyone who advertised on the radio station. Advertising in the paper was essential for some Lorain County stores. *Id.* at 148. The opinion indicated that it would be illegal for a group of competitors to deny access to customers in order to put a competitor out of business. The Court added that if a single firm rather than a group controlled the market, the single firm could not escape liability simply because an agreement was not present. By prohibiting the journal from denying access to those who also advertised on the radio, the Court in effect mandated partial terms for access to a single-firm facility. The access was granted to the customers, however, rather than directly to a competitor. *Id.* at 152-56.

⁸⁶ A. NEALE, *supra* note 12.

⁸⁷ *Id.* at 61-65, 128-34. Neale may deserve credit for coining the phrase "essential facility": "Sometimes it happens that one group alone has sufficient command over some *essential* commodity or *facility* in its industry These are so called 'bottleneck' situations" *Id.* at 68-69 (emphasis added).

⁸⁸ A. NEALE, *supra* note 12, at 62.

⁸⁹ 273 U.S. 359 (1927). Kodak, previously determined to have a photographic film monopoly, was found guilty of monopolization for refusing to continue to supply film at wholesale prices to an independent film retailer. The refusals, combined with attempts to purchase the victim's and other retailers' companies, were evidence of purpose to monopolize.

⁹⁰ 194 F.2d 484 (1st Cir. 1952).

Reliance on Neale's rationale for a broadly based essential facility doctrine may be misplaced given that *Associated Press* and *Terminal Railroad* provide only a limited foundation for such a broad rule. Only by analogy does Neale's language support the proposition that a single-firm essential facility may not deny access.⁹¹ He further explains that to require access, a court must find evidence of monopolistic intent or purpose in denying access, a factor he probably drew from *Southern Photo*, a case that most essential facility cases do not mention. Nevertheless, many decisions describe Neale's bottleneck doctrine as synonymous with the essential facility doctrine and use his language to support a broad essential facility theory.⁹²

Sullivan's formulation of what he called a "well developed rule about the exercise of lawfully attained monopoly power"⁹³ is also occasionally used for essential facility support. Sullivan describes a "public utility" approach that assures "reasonable access" to "scarce resources or natural advantage monopolies" in a manner analogous to the way regulation imposes common-carrier duties on public utilities. He cites *Terminal Railroad*, *Otter Tail*, *Silver v. New York Stock Exchange*,⁹⁴ and several lower court cases as establishing the rule.⁹⁵ While his analysis appears to support applying the doctrine to single-firm as well as jointly owned facilities, he uses conflicting conclusory language.⁹⁶ Sullivan, too, perhaps overgeneralized from the *Terminal Railroad*, *Associated Press*, and *Otter Tail* trilogy; he does not appear to have intended to propose a broad new antitrust doctrine.

⁹¹ Neale's discussion of a single firm's control of a "bottleneck" describes the denial of access as a "one-man boycott," indicating that he analogized to the group boycott aspects of *Terminal Railroad* and *Associated Press*. See A. NEALE, *supra* note 12, at 135. The 1980 edition ignores *Otter Tail*, which could support the single-firm portion of the theory. A. NEALE & D. GOYDER, *ANTITRUST LAWS OF THE USA* (1980).

⁹² In *United States v. Otter Tail Power Co.*, 331 F. Supp. 54 (D. Minn. 1971), for example, the district court cited Neale's language concerning group activity, despite the lack of group agreement in *Otter Tail*. *Id.* at 61 n.3 (citing A. NEALE, *supra* note 12, at 67). (Incidentally, the cite in the decision might be incorrect. The court apparently was citing to Neale's language at page 67 of the 1970 edition, not the 1960 edition.) The bottleneck concept is cited as applicable to single-firm activity in *Byars*, *Aspen Highlands Skiing*, *MCI*, and *Hecht*.

⁹³ L. SULLIVAN, *supra* note 5, § 48, at 125.

⁹⁴ See *supra* note 70.

⁹⁵ L. SULLIVAN, *supra* note 5, § 48, at 125.

⁹⁶ Compare a description of the public utility rule as applying to "a firm which holds a lawful monopoly," *id.* (emphasis added), with a description of elements used to determine to whom the rule will apply: "We can generalize by saying that if a group of competitors, acting in concert . . ." *Id.* at 131 (emphasis added).

3. Conclusions Concerning Support

A broad essential facility doctrine seems to have originated in part from a strained reading of Supreme Court cases by Neale, Sullivan, and circuit courts, and, in part, from a strained reading of Neale and Sullivan by circuit courts. The doctrine's existence and possible limits on its application vary depending on the circuit and the nature of the support used to bolster the particular formulation of the theory. Recently, some commentators have criticized the doctrine for having "embarrassing weaknesses" and causing "mischief"⁹⁷ and have suggested that the idea of an essential facility "doctrine" is "a bit grandiose."⁹⁸ Others have proposed at least partial expansion of the doctrine.⁹⁹ The remaining sections of this Article address the doctrine's value and, if the doctrine has value, its appropriate formulation.

II. THE HARM FROM DENIAL OF ACCESS

The essential facility problem arises when a firm (or group of firms) produces an item that other firms need in order to compete, but refuses to provide access to the other firms. In order to evaluate the doctrine's utility, it is helpful to consider (1) underlying antitrust values, (2) the proper definition of "essential," and (3) what it means to "deny access" and why an essential facility would be interested in doing such a thing.

A. Underlying Antitrust Values

A predominant motivation for modern antitrust enforcement is to promote the efficient allocation of resources.¹⁰⁰ The laws are used to

⁹⁷ Boudin, *supra* note 1, at 402.

⁹⁸ Travers, *supra* note 1, at 738.

⁹⁹ See Note, *Unclogging the Bottleneck*, *supra* note 1, at 463-69; Note, *Monopolist's Refusal to Deal*, *supra* note 40, at 1131-34. In their recent supplement, Areeda and Hovenkamp appear to support continued but limited use of an essential facility doctrine. They seem unconvinced that Supreme Court precedent supports a broad doctrine, see AREEDA & HOVENKAMP, *supra* note 1, at 585, but explore circumstances that might warrant applying the doctrine. *Id.* at 585-609. They urge that considerable caution be exercised before invoking the doctrine and would limit its use to denials to competitors. *Id.* at 585-87.

¹⁰⁰ See sources cited *supra* note 7. This Article is confined mainly to efficiency-based values. Just as there are likely to be nonefficiency values supporting enforcement of most laws, however, there are undoubtedly values other than efficiency-enhancement supporting enforcement of the antitrust laws. See, e.g., Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422 (1965); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982). One of the major tasks for modern

frustrate the efforts of firms to obtain or maintain market power.¹⁰¹ Obtaining market power is not generally permissible unless a firm achieves it through superior skill or efficiency, or the firm has the power thrust upon it. Intentionally maintaining lawfully gained market power by preventing or inhibiting others from competing is equally impermissible.

Market power in and of itself does not misallocate resources. A firm with market power, however, has the ability to raise its prices in a monopolistic manner, creating welfare losses due to resource misallocation. The misallocation occurs because some consumers willing to purchase an item at the competitive price will not purchase at the higher monopoly price. As a result, the quantity produced is lower than it would be in a competitive environment. It is the output reduction, rather than the fact that the consumers who do purchase pay a higher price, that is thought to be harmful to allocative efficiency.¹⁰² Monopoly pricing, while welfare harmful, does not ordinarily obtain or maintain market power for the monopolized product or service and in general is not explicitly illegal.

antitrust enforcement is to identify all underlying values and use the laws to promote those values. An essential facility rule that is designed to promote distribution of surplus in favor of purchasers, a more atomistic society, the psychic benefits of owning an independent business, or other values may be shown to be a worthwhile approach, but consideration here would extend this Article to intolerable length.

¹⁰¹ For the purposes of this Article, market power is the ability of a firm to profitably maintain, for a significant period of time, a price above the level that would persist in a competitive market. "Price" should be considered a proxy for various price and service/quality combinations.

¹⁰² See, e.g., R. POSNER, *supra* note 61, at 8-22; F. SCHERER, *supra* note 6, at 9-44. The basic idea is that a purchaser who buys at the monopoly price reveals willingness to buy at a price above the competitive level. The purchaser thus loses the consumer surplus that would be hers if the price were at the lower level; the purchase at the higher price does not alter the use of resources in an unambiguously harmful manner, however, because the purchase still occurs. The question of who should be entitled to the surplus is distributively important, but does not have a clear efficiency implication, because it cannot safely be presumed that either producers or purchasers will use the resource most efficiently. Those who do not purchase, however, have their resources inefficiently misdirected to a different use, be it savings or expenditures on some different product.

Posner points out that monopoly creates an efficiency implication in addition to the output reduction factor. R. POSNER, *supra* note 61, at 11-14. People may squander resources by attempting to obtain a monopoly, and they have incentives to spend anticipated monopoly profits to obtain a monopoly. This welfare-harmful squandering of resources is an indirect rather than a direct result of monopoly pricing; while it is harmful, it is not an inevitable result of monopoly pricing, unlike output reduction.

B. *What Makes a Facility Essential?*

An "essential facility" is simply a different way of describing a "monopoly of an input" or "an input with significant market power." An input is a necessary ingredient of a final product; the essential facility problem arises when firms producing a final product are denied access to the input. A firm has monopoly or market power if it has the ability to sustain a price significantly above a competitive price for a nontrivial period. An essential facility has monopoly power over the input it produces because substitutes and new entrants that could constrain the firm to the competitive price level do not exist.¹⁰³ No substitutes for the input exist; if they did, demanders would not be forced to purchase from the facility and thus the facility could not be considered essential. Similarly, if rapid entry into the input-production market were easy, the facility would be neither essential, as buyers could obtain alternatives, nor impracticable to duplicate.¹⁰⁴

The essential nature of an input needs to be evaluated carefully and cannot be determined simply by looking at market shares. The appropriate analysis is to determine if alternatives for the input exist for those firms that use the input to produce a particular final product. Alternatives can include similar facilities, different but substitutable products or services, or new entrants for similar and substitutable products or services.¹⁰⁵ A lack of constraining alternatives identifies an essential input.¹⁰⁶

¹⁰³ See, e.g., *Aspen Highlands Skiing*, 738 F.2d 1509 (no alternative to multi-area, multiday ski pass joint venture); *MCI*, 708 F.2d 1081 (no alternatives to existing telephone interconnection facilities); *Hecht*, 570 F.2d 982 (no alternatives to RFK Stadium).

¹⁰⁴ *Hecht*, *MCI*, and most other essential facility formulations evaluate whether it is practicable to duplicate the facility. That evaluation should not focus only upon whether the denied firm can feasibly enter. If any firm can enter easily and rapidly, the new entrant becomes a feasible alternative for the purchaser and renders the facility less essential.

¹⁰⁵ Varying the production factors may be an alternative for the purchaser. If the facility's input can be avoided, for example, by increasing the amount of labor, the facility may not be essential. If adding labor will change the amount, but will not entirely avoid the use of the input, the facility appears unavoidable. In general, alternatives must be available to the purchaser at a feasible price. An alternative that has higher costs than the facility will be unable to fully constrain the facility; thus, the facility will have power limited only by the higher cost alternative. An alternative is not viable if it would raise the purchaser's costs to an unacceptable level.

¹⁰⁶ A major reason to consider an input essential could be that the input market presents natural monopoly characteristics. (A natural monopoly exists if one firm could produce the entire industry output at a significantly lower cost than could several

For example, if three different airline computer reservation systems (CRSs) operate in a city, it is a mistake to conclude automatically that no one system is essential to any airline. If removal from one of the systems would be fatal to all carriers, that CRS may be essential regardless of the presence of other systems. On the other hand, a city may have only one CRS, and a carrier denied access may be able to show that it will not survive without access. Nevertheless, the CRS still may not be essential if ten other carriers could provide competitive service for that city without being listed on the CRS. The fact that the other airlines can provide the service without access strongly suggests that adequate alternatives to the system exist.¹⁰⁷ Otherwise, an essential facility definition would protect the individual competitor who could not survive in the market rather than the competitive process of providing a particular product or service.

C. Denial of Access

To determine if prohibitions on denials of access to an essential facility are supported by antitrust values, the effects of a denial on the competitive process need to be considered.¹⁰⁸ An input monopolist might restrict access to its product for several reasons: to exclude those unable to cover the minimum costs of generating access; to increase or maintain market power; to exploit market power; or to conform with irrational or non-profit-maximizing desires. The reasons are not mutually exclu-

firms.) In such a situation any entry that would provide an alternative source for the input is not likely to survive. A facility may have no viable substitutes and not face entry, however, even though the market can accommodate several efficiently sized firms. Risk, capital market imperfections, more attractive alternative investments, name recognition, or other factors may all contribute to the conclusion that a facility is not practicably duplicable.

¹⁰⁷ Airline CRSs pose a fascinating situation. For insignificant or new carriers, listing on a major system is probably indispensable. The same is not necessarily true for major established carriers, although even those carriers seem unwilling to risk being removed. If a major carrier in a city refused to be on a CRS, that CRS, rather than the carrier, might be doomed. On the other hand, it may be that no carrier can afford to be removed from a CRS placed in a dominant number of travel agents in a major city. *See, e.g.*, Comments of the Department of Justice, Nov. 11, 1984, Advance Notice of Proposed Rulemaking — Airline Computer Reservation Systems, Civil Aeronautics Board EDR 466, Docket 41686.

¹⁰⁸ For essential facility purposes, it can be assumed that the facility has legally obtained its power. If not, the facility may be subject to suit for illegally obtaining a monopoly, regardless of whether access has been denied. The essential facility problem focuses on the denial as a possible misuse of the facility's power, not on how the power originally came to be.

sive. A simple but crucial point to bear in mind is that denial of access cannot be separated from the question of "denial at what price?" Except in pathological cases (in which the denial in and of itself is valued very highly, presumably for vindictive or other psychological reasons) access will be provided if the price paid is high enough. Denial of access will occur whenever the provider does not receive a high enough offer.

D. The Case of the Essential Stadium

Assume that access to a stadium in a city is essential for the existence of a professional football franchise and that only one stadium exists in that city. Also assume that the stadium is not practicably duplicable, the stadium owner can provide access to a football team without interfering with other stadium uses, the owner of the stadium has not integrated downstream (that is, the owner does not also own any entity that might wish to use the stadium), and the owner has not yet leased the stadium to any football team. Finally, assume that a firm is seeking access.

1. Denial to Those Unwilling to Cover the Costs of Generating Access

Potential stadium lessees will not become actual lessees if they are unwilling to pay an amount that would cover the cost the stadium owner would incur by leasing.¹⁰⁹ If a professional destruction derby lessee would dig up the stadium ground, break the walls, and attract fans who would periodically set fire to the seats, the minimum lease price will have to be above the cost of repair. If that price is too high for the destruction derby group to afford, the stadium owner will have "denied" access.

This denial seems like an obvious point, and it is tempting to suggest that the situation is just the efficient market at work rather than a "denial of access." Nevertheless, the destruction derby group is refused access. Although the destruction derby group may not be happy, the denial is not welfare-harmful. In fact, the denial is nothing more than an example of the general concept that it may be inefficient to allow a resource to be obtained by someone unwilling to pay the cost of generating that resource.

¹⁰⁹ Cost includes an amount of return sufficient to justify not taking the resources of the stadium and investing them elsewhere.

2. Denial to Preserve or Increase Market Power in the Stadium Market

The stadium owner could conceivably deny access to a particular team as part of a long-run predatory strategy designed to maintain the market power that the stadium owner currently possesses. If the owner believes that a team seeking stadium access may eventually establish a presence in the city and build a competitive stadium, the owner might deny access in the hope that the team will never establish itself and the new competitive stadium will thus be avoided. This is a typical predation strategy. Current opportunities for revenue are given up because the owner believes that the chance to maintain market power for an increased length of time is more valuable than the revenues foregone.¹¹⁰

The strategy does not appear to be a particularly lucrative way for an essential facility holder to invest. By definition, the facility is not practicable to duplicate for a significant short-run period. Thus, fear of imminent entry should not exist.¹¹¹ In the longer run, access denial does not clearly discourage entry. If entry is feasible enough for the stadium controller to invest substantial amounts to preclude it, a nonteam entrant may be tempted to enter the stadium business. In addition, denial may attract or stimulate interest in building a new stadium.

3. Denial to Maximize Monopoly Profits

In order to maximize profits, the stadium owner might deny access to a group willing to cover the leasing costs. The stadium owner, as a monopolist, maximizes profits by charging a price well above the minimum needed to cover the costs of providing access. Only those who can afford the higher price will receive access; those people willing to pay at least the cost of generating the resource (that is, the competitive price) but unwilling to pay the higher amount are denied access. While the stadium monopolist benefits by extracting higher prices from those willing to pay the higher amount, the denials to those who would purchase at the minimally profitable price are considered to be welfare-harmful. Absent a predatory hypothesis, however, the denials will not

¹¹⁰ Many commentators offer views on how to deal with predatory activity. See Hurwitz & Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979).

¹¹¹ In addition, the longer the time until the predator can recoup its investment, the greater the opportunity cost of the revenue forgone. Dividends from the predation do not accrue until the time when entry deterred by predation otherwise might have constrained the facility to a lower price for access.

maintain or increase the stadium owner's market power.¹¹²

The stadium owner may also maximize profits by charging different users different amounts for access to the stadium, depending on each user's ability to pay. To the extent such price discrimination is possible and various uses do not conflict, the stadium owner has an incentive to provide rather than deny access to anyone willing to pay at least the competitive price.¹¹³ While price discrimination is difficult for some producers,¹¹⁴ a stadium owner may be able to discriminate successfully unless precluded by law. Thus, the owner might not deny access as extensively as would be the case if she charged one monopoly price. On the other hand, unless the monopolist discriminates perfectly, some welfare-harmful output reduction will occur, as some firms willing to pay the competitive price will not obtain access.¹¹⁵

E. An Integrated Essential Facility

Most essential facility cases dwell on an integrated facility that denies access to an actual or potential competitor in a downstream market. Accordingly, relax the non-integrated-facility assumptions in the example and assume that the stadium owner also owns the only professional football team in town.¹¹⁶ Another professional football team wants access to the stadium, and the stadium owner could provide it without interfering with the use of the stadium by the owner's team. The new team, however, may provide competition against the owner's team and thus reduce the revenue taken in by the owner's team.¹¹⁷ Does the fear of losing power in the football market give the stadium owner

¹¹² The higher price and reduced output do not eliminate or discourage firms that would otherwise constrain the facility, unless entry is more difficult as a consequence.

¹¹³ Many essential facility cases consider discriminatory access to be a form of denial. See *infra* note 180 and accompanying text.

¹¹⁴ Price discrimination, especially sophisticated customer-by-customer discrimination, is often difficult because of arbitrage possibilities and the cost of obtaining information about each purchaser's reservation price. In addition, some control over price (something an essential facility by definition has with respect to at least some customers) is a prerequisite for price discrimination. See F. SCHERER, *supra* note 6, at 315-34.

¹¹⁵ Also, the ability of a monopolist to price discriminate will increase the worth of the monopoly and therefore the amount of resources someone will be willing to squander to obtain it. See *supra* note 102.

¹¹⁶ This analysis also applies to an unintegrated stadium owner who may wish to enter the downstream football market.

¹¹⁷ Assume that professional football in the city is a distinct product without significant constraining substitutes. If substitutes effectively competed with football, the stadium might not be essential unless all substitutes also required the use of the stadium.

an additional reason to deny access to the prospective lessee?¹¹⁸

1. Maximizing Profit Versus Increasing Market Power

In theory, the stadium owner need not be overly concerned with competitors in the professional football market. The owner has effectively monopolized the professional football market by controlling an essential input for competing in the football market — the stadium. The stadium owner can set a lease price for the stadium that will enable her to extract the highest possible profit from the professional football market in that city regardless of whether she also owns a team. It is possible that a new team could operate at lower cost, attract more fans, or in some other manner maximize profits more effectively in professional football than could the owner's team. In this situation the stadium owner can maximize profit by leasing to the new team, setting a lease price that will enable the new team to earn just enough to justify its continued existence, and, if necessary, dropping her own team out of the football market. If, on the other hand, the owner's team is the most efficient,¹¹⁹ it would be most advantageous for the owner to lease only to her own team because her team could earn more than could the highest lease price to another team. Similarly, if the most effective method of generating profits is to lease to several teams and let them all play in the stadium, the owner will lease to the most efficient teams, but again, her own team will not necessarily be one of them.¹²⁰

Regardless of whether the owner's team participates or drops out, the owner maximizes profits by influencing the downstream football

¹¹⁸ To a large degree, this portion of the example raises issues concerning leverage and the ability of an upstream monopolist to manipulate the downstream market. Leverage is discussed extensively in part III. *See infra* text accompanying notes 138-49.

¹¹⁹ "Most efficient team" is admittedly an illusive concept. Further, the psychic benefits of owning a team (the prestige and influence in a city, membership in the fraternity of professional team owners, association with athletes, and the vicarious thrill of victory and agony of defeat) are difficult to calculate.

¹²⁰ If the most effective way to extract monopoly profit is to rent only to the most efficient team, the stadium owner can set the lease price high enough so that only the most efficient team can afford the lease and still make enough money to justify continuing to have the team. This can be achieved by offering a lease price that is slightly higher than the cost of generating access plus the profit from owning the only football team in town. If the owner also has the most efficient team, no other team will be able to afford access because no other team will be able to generate enough profits to justify purchasing the lease. If another team can afford the lease, the owner could make more by leasing to a more efficient team than by continuing to run its own team. The owner's profit maximizing behavior is to extract as large a lease price as the new team can afford and lease to the new team.

market to approximate the result that would occur if a long-term monopoly persisted downstream. The stadium owner will force the downstream team(s) to extract a monopoly profit from the market and will skim off all of that profit by charging a lease price that extracts all supernormal profits gathered by the team(s).

Denials to all but the most efficient team(s) may be welfare-harmful if other teams are willing to pay an amount greater than the cost of providing access and could still survive downstream. The denials, however, should not be characterized as a scheme to obtain or maintain the ability to charge monopoly prices. Rather, the denials result from the welfare-harmful monopoly pricing of the stadium described earlier, which is likely to occur regardless of whether the stadium owner has integrated downstream. Absent a predatory hypothesis, the stadium/team owner gains no additional power or longevity by denying access.¹²¹ The denials maximize profits and are economically harmful,¹²² but do not increase or maintain power.

Given that a stadium owner with a monopoly will extract monopoly profits from the professional football market regardless of whether the owner has integrated, it is arguable that the access denial is beneficial if it ensures that the operating football team(s) will be the most efficient teams. Even though an unconstrained stadium monopoly will preclude a competitive output in the football market in that city, society benefits by having the most efficient team(s) obtain a lease.¹²³ Denial of access

¹²¹ The power originates and resides with control of the stadium. Denying access to other teams does not remove a threat to that power, unless the denial is predatory. It enables extraction of monopoly profit in the manner the owner prefers.

¹²² Some might argue that given the existence of the stadium monopoly and the inevitable welfare-harmful output reductions it can inflict, the denial does not necessarily make things worse. To the contrary, installing the most efficient downstream producer may make things better. These arguments typically support claims that ties and other leverage activities should not be prohibited. *See infra* text accompanying notes 138-49. The fact is, however, that denial is welfare harmful output reduction in some cases. The question is whether the harm should be tolerated or if it can effectively be remedied. *See infra* text accompanying notes 178-226.

¹²³ In general, resources are used most efficiently when costs are minimized, regardless of whether monopoly or competition or something in between is the prevailing form. Thus, it is desirable to have the lowest-cost producers downstream. For example, although nonsensical in the stadium context, for some inputs a downstream purchaser can at least partially avoid the input by varying the factors of production. One reason the downstream firm may be producing less efficiently is that facing a monopoly price for the input has distorted the firm's input mix. It may be more efficient to have the integrated facility deny access to others altogether and produce downstream using the most efficient mix of inputs. The efficiency benefits from the denial, however, are possible only because the upstream monopoly is causing the inefficiency corrected by the

can be predicted to generally achieve that result rather than to preclude it. The benefit from denial exists, however, only because the upstream monopoly prevents the downstream market from achieving the most efficient result.¹²⁴

2. Unavailability of Price Discrimination with Respect to Different Users

Whether integrated or not, the stadium owner has incentives to price discriminate and charge the highest prices possible to various users. The effect of such discrimination would be to reduce the number of denials of access. An integrated stadium owner who cannot effectively price discriminate, however, might choose to deny access to a football team more efficient than the owner's team. The rental rate that the stadium owner must charge in order to justify letting the more efficient team lease may be so high that it would discourage all other teams from leasing. The owner, faced with the choice, might prefer to make football profits from her own team, even though that means foregoing some profit that could be extracted from a more efficient team, rather than give up all other opportunities for stadium revenue.

Similarly, if the highest rent the owner could charge any football team is significantly lower than the rent she could charge other users, and discrimination is unavailable, the stadium owner may deny access to all teams other than her own, even if hers is not the most efficient team. By leasing to only her own team, the owner avoids having to set a low lease price for all users. The owner can charge herself and everyone else a high lease price. The tactic will not hurt the owner, since she will be paying the high price to herself, but the tactic will eliminate football users who would otherwise constrain the owner to a lower lease price.

Whether perceived as an effort to exploit existing power or as an attempt to increase or maintain power, a denial that is designed to

denial. A competitively priced input would yield the most efficient solution.

¹²⁴ A newer, less efficient team that is denied access might become a more efficient team if given a chance to develop. Frustrating that development could be considered welfare-harmful even in the context of a stadium monopoly upstream because it hampers the development of a more efficient producer. The harm, however, would be caused by the stadium owner's lack of information. If the stadium owner is just as capable as an omnipotent efficiency evaluator of determining the potential for efficiency, the owner has incentive to provide access at the highest price the new team can afford, let the team develop by providing access now at a slightly lower price, and extract higher profits when the new team becomes more efficient.

achieve a result similar to price discrimination appears welfare-harmful. It is harmful in general if teams willing to pay the cost of generating the resource are victimized. It is also harmful when it creates a situation in which the sole football team in operation is not the most efficient one. The denial can be thought of as an effort to exploit currently existing stadium market power given the constraint that price discrimination is not available. The denial, however, can also be viewed as an attempt to increase or maintain stadium market power by removing other potential stadium price users who would otherwise constrain the facility to a lower lease price.

3. Regulatory Evasion¹²⁵

Incentives change significantly if the upstream stadium lease rate is regulated. The regulated integrated stadium owner will go to great lengths to obtain and maintain downstream power because regulation vitiates the option of extracting monopoly profits through the stadium lease price.¹²⁶ To preserve the ability to earn monopoly profits, the owner may refuse to provide access to teams to keep them out of the downstream market.¹²⁷

This denial, best characterized as effectuating regulatory evasion, is welfare-harmful. It allows a regulated monopolist to skirt regulation by integrating into a downstream market and using its input monopoly to monopolize the downstream market. The tactic can be thought of as obtaining or maintaining market power in the football market, for without the tactic the owner would be considerably less able to extract monopoly profits. The power, however, already exists. The regulation keeps the monopolist from exercising it, and the denial gives the oppor-

¹²⁵ The analysis in this section applies as well when some factor other than regulation makes extracting profits in the downstream market attractive. These factors may include nonprofit status, *see supra* note 69, taxes, marketing, and a desire to disguise monopoly prices and profits by splitting them between the upstream and downstream markets. These activities are best characterized as monopoly pricing techniques designed to extract the most out of what already exists, rather than techniques that will increase power, unless something analogous to regulation is constraining the facility from exercising its power upstream.

¹²⁶ Even if regulation is inept, the costs of dealing with the regulation may render downstream extraction of profits attractive.

¹²⁷ Regulatory evasion is a plausible story for several essential facility denials. *See, e.g., Otter Tail*, 410 U.S. 366; *City of Mishwaka, Ind. v. American Elec. Power*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). *Terminal Railroad* is probably not about evasion; there is little reason to suspect that terminal regulation was more effective than line-haul regulation.

tunity back to the monopolist.

F. A Jointly Owned Integrated Facility

One final addition to the example concerns the implications of several horizontal competitors jointly owning the essential facility. Assume that three competing football teams jointly own the stadium and all have access to the stadium. A new team seeks access, and the owners could provide access without interfering with the current use of the stadium. Does the joint ownership alter any of the incentives or suggest a greater potential for harm?

Theoretically, the answer seems to be no. A jointly owned monopoly still maximizes its return by charging a monopoly price for the input. If the team seeking access would contribute larger profits to the monopoly than would all of the owners' teams, the rational thing for the owners to do would be to rent only to the new team, extract the full monopoly price from the rental charge, and cease to operate their own teams. By finding the most efficient downstream producer(s) and charging the highest price for the stadium, the three owners could split the largest monopoly profit.

It is possible, however, that with a jointly owned integrated facility, deciding who the most efficient downstream producer is and how to divide up the monopoly profits may sometimes cause insurmountable difficulties. For example, the full profit available may be quite speculative. Conservative owners may not wish to jeopardize what currently exists — the ability to make some profits by operating downstream. Rather than sacrificing the downstream operation in the hope that splitting larger upstream profits will yield a greater amount, each joint owner may decide that the most convenient method of dividing monopoly rents is for each of them to extract whatever benefit they can in the downstream market. Alternatively, each owner may believe that the profits her team earns downstream will exceed one-third of the expected monopoly profits upstream¹²⁸ and might wish to gamble that her team will get the bigger share of the pie. Either way, the owners will be likely to object to allowing a new team into the city, as that would risk eroding their profits, so they may agree to deny access to all other teams.¹²⁹

¹²⁸ Of course, all three cannot earn a greater amount. The point brings to mind an answer given by an airport manager to a question, posed by a Justice Department attorney, concerning the market share of a major airline at his airport: "Their share is going up, just like everyone else's."

¹²⁹ Extracting profits in the downstream market may yield a significantly lower re-

Such denials are welfare-harmful as long as the new team is willing to pay the costs of providing access. In addition, the continued operation of the owners' teams may also be harmful if they are not the most efficient downstream providers, but continue to operate solely because they are part-owners of the stadium.

Characterizing the denials is difficult. In a sense, they cannot really be described as increasing market power, because the owners do not gain power additional to what they already have by virtue of controlling the stadium. If prohibited from denying access to downstream competitors, the owners would likely choose another method of extracting monopoly profits from the stadium rather than accepting a competitive environment.¹³⁰ The owners, however, do believe they are maintaining their power in the football market, and given a choice to try to extract profits downstream, the power is being protected. Letting a new team compete will not diminish their power, because they control the stadium; but it will diminish their ability to extract monopoly profits in the manner they desire. Instead of maintaining power that otherwise would slip away, the denial maintains each owner's desire to gamble free from new competitors.

III. IS THERE ANY NEED FOR THE ESSENTIAL FACILITY DOCTRINE?

Based on the foregoing analysis, how should courts apply the doctrine, if at all? Will the doctrine further the antitrust goal of promoting efficient resource allocation? Does the doctrine contribute a new theory of antitrust enforcement, or is it subsumed in long-standing antitrust concepts? If the doctrine does provide a unique basis for antitrust enforcement, in what ways should it be limited?

turn than one-third of the monopoly price, because the teams may compete away some or all of the profits. Unless the teams reach other (possibly illegal) agreements (or one team murders the other teams' quarterbacks, also possibly illegal), each team may try to attract a greater share of revenue by lowering its ticket prices and hiring a few "franchise" players. Absent regulation or some other interference with the ability to extract profits upstream, it is likely to be much harder for the several firms to coordinate their downstream activities in a joint profit-maximizing manner, as they must coordinate numerous variables. As with any oligopoly, incentives to cheat will exist, and policing will not be easy. It would be far easier to use the input as the method of coordination, divide the profits from the facility, and not be so concerned with the downstream market.

¹³⁰ For example, they might drop out of the football market and just be stadium monopolists.

A. *Denials That Increase Power Versus Denials That Harmfully Exercise Existing Power*

If the antitrust laws are not to expand beyond their current prohibitions of obtaining and maintaining market power, the essential facility concept may not be particularly useful. As the above examples suggest, denials of access by the controller of an essential facility, whether integrated or not integrated, singly or jointly owned, do not invariably or even frequently increase or maintain market power. The doctrine could end up prohibiting denials that do not increase or maintain market power but instead contribute efficiencies. Distinguishing between denials of access to competitors and noncompetitors or between single firm and joint ownership of the facility will not successfully salvage the doctrine. When maintenance, increases, or attempts thereof might occur, current antitrust doctrines seem capable of identifying the problem and prohibiting harmful activity.

If a goal of antitrust enforcement is to discourage inefficient allocations of resources that result from the exercise of market power, however, the essential facility doctrine can be invoked in a manner consistent with that goal. The stadium example demonstrates that many denials of access can be welfare-harmful even if they do not maintain or increase market power.

B. *Denials of Access Having the Effect of Obtaining or Maintaining Market Power*

Denials of access theoretically could increase or maintain market power in either the upstream market, where the facility produces, or the downstream market, where demanders of the input produce, or both.

1. *Maintaining Market Power in the Upstream Market — The Market Where the Facility Exists*

Under the predation scenarios described above, the controller of the essential facility sacrifices present revenues by denying access to preserve its upstream monopoly in the long run. A denial could prevent entry into the upstream market, and it is true that a rule preventing denial of access will eliminate this form of predation.

The essential facility doctrine, however, is not needed to prevent this type of harmful activity. Because controlling an essential facility is tantamount to controlling a monopoly, any activity by the facility that is designed to maintain market power is probably illegal monopolization

under section 2 of the Sherman Act.¹³¹ Combined with existing market power, denial of access would probably be a bad act constituting illegal monopolization. Courts need not use a new doctrine or resort to a new name to find a denial illegal if the design is predatory.

Nor should every denial be made illegal just because a predation motive is possible. To determine if the activity is predatory (that is, will maintain upstream power), the circumstances of the denial must be assessed. Predation is not rational unless the chance of successfully maintaining power is worth more than the revenues sacrificed. If duplicating the facility is not practicable (a prerequisite to being an essential facility), the chances of threatening entry ought not be substantial. Accordingly, denial to preclude entry by firms that cannot practicably enter in the short run anyway may seldom be rational. While predatory activity that causes economic harm arguably ought to be prohibited regardless of whether the predation is rational, even that argument assumes that a denial can be shown to be economically harmful — a finding not required by the essential facility doctrine in any of its forms.¹³²

Given that denials will probably not maintain upstream power, let alone inevitably lead to that result, a broad essential facility doctrine is a poor technique for prohibiting predation in the upstream market. The doctrine does not encourage analysis; it stops with the denial, rather than analyzing the effect. The doctrine appears to apply automatically even if the denial would not in fact increase the facility's market power or otherwise have an anticompetitive harmful effect.¹³³

Invoking the doctrine only when an integrated facility denies a downstream competitor access might limit the doctrine to cases in

¹³¹ See, e.g., H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 146-56 (1985).

¹³² Some might argue that certain kinds of predatory pricing should be illegal absent motive or rationality. A price below short run marginal cost (SRMC) that does not cover average costs is an economically harmful price. Unless it would overly discourage the competitive process, a ban on such a price is beneficial regardless of whether it is rational to believe that the price will be a successful tactic for reaping longer run supernormal profits. The analogy to essential facility would support prohibiting all harmful denials regardless of whether the denial increased power. See *infra* text accompanying notes 170-226. Not all denials of access can be presumed harmful, however, in the way that a price below SRMC can be presumed harmful.

¹³³ In the stadium example, it may not be rational to believe that anyone, new team or otherwise, would build a stadium in the next 50 years. For example, the market may present natural monopoly conditions, land values may not justify using scarce land to try to erect a competitive stadium, or zoning may preclude construction. A denial would not increase or maintain power in the stadium market; use of the doctrine, however, would avoid the analysis and render the denial illegal.

which predation actually occurs. An integrated facility may be more likely to attempt predatory denials because its cost of doing so may be lower.¹³⁴ Unfortunately, the integrated facility limitation is not a helpful drawing line for identifying when access denial is predatory and harmful. Cheaper may mean more likely, but it does not mean predation will occur only in the integrated case. Any customer of the facility may be a potential entrant, not just the customers the facility competes against downstream.¹³⁵ Moreover, the reduced cost does not make denials by the integrated provider inevitably predatory. While the low-cost nature of an integrated firm's denial should be noted, denials by all firms with monopoly power should be analyzed to determine if they contribute to an increase or maintenance of power. An essential facility rubric is likely to hamper rather than aid the analysis.¹³⁶

Similarly, distinguishing between single-firm and jointly owned essential facilities is not helpful; the likelihood of predation does not appear to be greater when the facility is jointly owned. Concerning upstream power, the activities of a facility should not automatically be labeled illegal simply because the owners compete with each other in a downstream market. The "agreements" to deny access do not more strongly confer or protect upstream power than would denial by a single-firm facility.¹³⁷ The effect of a denial on the upstream market should be noted and labeled impermissible when harmful, whether achieved by agreement or otherwise.

¹³⁴ For an integrated facility the cost of denying access is the difference between the amount of profit that the facility could have earned by leasing to a more efficient team and the profit earned by the facility's own less efficient team. The nonintegrated stadium owner must forego the entire amount of revenue available from providing access, a far greater amount. The nonintegrated owner might reduce predation costs by providing access only to users that pose no threat of stadium entry.

¹³⁵ Discouraging a potential entrant protects upstream power. The fact that the entry would have come from a participant in industry *A*, where the integrated facility produces, rather than from industry *B*, where the facility does not compete, has no bearing on the protection of the upstream market.

¹³⁶ Without resorting to an essential facility doctrine, the Supreme Court has found predatory denial to be illegal. *See, e.g., Aspen Highlands Skiing*, 472 U.S. at 610; *Lorain Journal*, 342 U.S. at 153.

¹³⁷ The joint venture itself may protect the power of the facility if the owners' participation in the joint venture dissuades them from entering the market on their own.

2. Denial Designed to Obtain or Maintain Market Power in the Downstream Market — *i.e.*, the Market Where the Firm Denied Access Operates

a. Leverage

To the extent that the essential facility doctrine is designed to prevent an integrated facility from gaining downstream market power by denying access to downstream competitors, the doctrine becomes analogous to a leverage theory that prohibits use of monopoly power in one market to gain or maintain market power in a different market.¹³⁸ A denial to a downstream competitor raises the question of whether an upstream monopolist can increase market power by “leveraging” its power and becoming the sole or dominant producer downstream.

The notion that a firm with monopoly power in a market is not permitted to use the power to gain advantage in a different market is not new. The theory was forcefully articulated in *United States v. Griffith*¹³⁹ and was reiterated in *Otter Tail*.¹⁴⁰ In *Berkey Photo, Inc. v. Eastman Kodak Co.*¹⁴¹ the leverage theory was applied in the context of an attempt by a firm with monopoly power to gain “a competitive advantage” rather than a monopoly of a downstream market. Leverage has also been considered to be a significant premise for outlawing tied-sales agreements.¹⁴²

By denying access, a facility can make life miserable for its downstream competitors. Without access to the facility, competitors will be unable to survive (or will be at a severe disadvantage) and thus cannot effectively constrain the downstream portion of the integrated facility. A denial by an integrated facility will likely preserve or increase the market share of its downstream component and will harm a downstream competitor. This scenario certainly looks like a classic antitrust violation, and prohibiting the activity seems consistent with *Griffith* and *Berkey* as well as *Otter Tail*, *Terminal Railroad*, and *Associated*

¹³⁸ See Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 516-17 (1985). Leverage by an essential facility can also be thought of as predation — a sacrifice of revenues in the input market in order to realize increased profits in the downstream market.

¹³⁹ *United States v. Griffith*, 334 U.S. 100 (1948); see also *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917); *Henry v. A.B. Dick Co.*, 224 U.S. 1 (1912) (White, C.J., dissenting).

¹⁴⁰ 410 U.S. at 377.

¹⁴¹ 603 F.2d 263, 275 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

¹⁴² See Kaplow, *supra* note 138, at 517.

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Leverage theories, however, have been effectively criticized.¹⁴³ The basic criticism is that monopolizing a new market by exercising currently existing power will not enable a firm to behave in a more economically harmful manner.¹⁴⁴ The analysis is virtually tautological: because the upstream essential facility by definition already has full control, it cannot gain additional power by being the sole downstream producer. The stadium example illustrates the point. The stadium owner has complete power to force a monopoly result in the football market and would not gain additional power by being the only team in town. The owner therefore has no incentive to deny access in order to gain power. What appears to be leverage activity does not increase the market power of the input and may in fact be activity that enhances efficiency.¹⁴⁵ At the very least, courts should examine the leverage activity closely to determine if market power increases are possible.¹⁴⁶

Using an essential facility concept to render all denials to competitors illegal finesses the leverage issue by presuming that the denial will harm downstream competition. Current formulations of the doctrine question only whether access is practicable, not whether the denial will increase the power of the facility or otherwise foreclose competition.

¹⁴³ See, e.g., R. BORK, *supra* note 7, at 140; R. POSNER, *supra* note 61, at 173, 197; Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957). The criticism of leverage theories has itself been criticized. See, e.g., Hovenkamp, *supra* note 7, at 233-55; Kaplow, *supra* note 138; Slawson, *A Stronger, Simpler Tie-in Doctrine*, 25 ANTITRUST BULL. 671 (1980).

¹⁴⁴ See, e.g., R. BORK, *supra* note 7, at 140; R. POSNER, *supra* note 61, at 173, 197; see also Kaplow, *supra* note 138, at 516-20.

¹⁴⁵ The denial may enable the facility to install itself as the most efficient downstream provider. This is efficient, and not harmful, only if the upstream monopoly will in any event be left alone to reap monopoly profit. Benefit is clear only if the harmful upstream monopoly behavior is assumed to persist. See *supra* notes 122-23 and accompanying text.

¹⁴⁶ Leverage may facilitate increases of power. As a practical matter, it is likely to be difficult for an input monopolist to fully extract the monopoly profits available from the downstream market. Negotiations with downstream producers regarding the access price will not be instantaneous and may be costly. Downstream producers may overstate their costs and hide their profits. After an access price is set, beneficial competition could take place in the downstream market. If the facility substantially increases its share downstream, that competition could be reduced. Further, if price discrimination is unavailable, some downstream firms might be constraining the facility to a more competitive access price. See *supra* text accompanying notes 124-25. Eliminating these firms can be thought to increase market power. In addition, just as a reminder, there are possible nonefficiency values supporting prohibitions on leverage activities that are left aside in this discussion. See, e.g., Blake & Jones, *supra* note 100, at 459-61.

Given persuasive arguments that leverage activity is not inevitably economically harmful and might be beneficial, it is a bad idea to ignore the issue in the essential facility area.¹⁴⁷ Specific consideration should be given to the question of whether the denial will eliminate or harm a competitor who would, absent the denial, constrain the facility to less harmful prices and output. While the denial will hurt the competitor, the denial's influence on the downstream competitive process needs to be assessed rather than presumed away. When a denial results in an actual increase in power, the denial would be an impermissible act by a monopolist and would support a finding of illegal monopolization. The essential facility doctrine is not needed to obtain the result.¹⁴⁸

b. Is a Denial to a Competitor Worse?

To the extent one believes that the essential facility doctrine should be used to protect downstream competition from harmful leveraging, it makes little sense to draw distinctions between denials to competitors and denials to purchasers who are noncompetitors. This may seem a surprising conclusion. A facility that denies access to some purchasers but does not compete downstream has no downstream share to increase and no competitors to harm. It appears content to sit upstream and manipulate the downstream market without trying to leverage or extend power into a new market. It is incorrect to conclude, however, that the denial will create evil market power or harm to downstream competition only when the facility has a downstream component.

The effect of a denial on the downstream market is not altered by the

¹⁴⁷ Presumption of illegality, like any per se rule, may encourage plaintiffs to categorize an activity as falling into the per se area to avoid showing harm rather than develop facts and information demonstrating why the activity is harmful.

¹⁴⁸ In *Hecht*, 570 F.2d 982, for example, a stadium denied access to all but one football team, the Washington Redskins. One conclusion is that the District of Columbia Armory Board was manipulating the professional football market and extracting the highest possible stadium rental from the Redskins. The Armory, however, was losing money from the stadium, *id.* at 987 n.6, and a clause in the lease provided that the Armory could not lease to any other professional football team. *Id.* at 985 n.2. These facts suggest that while the stadium may have had some power, the Redskins' lease may have been more essential to the stadium's existence than the stadium was to the Redskins. The team may have used its power in the football market to extract low rental charges and the lease provision. The provision enabled the Redskins to maintain its power. Thus, *Hecht* may be a case of a downstream monopoly using power to coerce an upstream facility into helping preserve the downstream firm's power. The activity could be considered illegal, without resort to an essential facility doctrine, as monopolization or attempt to monopolize the downstream market.

presence *vel non* of a facility's downstream component.¹⁴⁹ An integrated facility, by denying access, may become the only downstream producer. That activity may be considered to cause an increase in power that will distort downstream competition. The same increase in power and the same harmful result will occur, however, even if the denials cause some firm other than the facility's downstream component to become the sole downstream producer. If the facility denies access to only some downstream producers and provides access to several others, the distorting significance of the denials should not be presumed to differ depending on whether the facility maintains a downstream presence.

Thus, from an essential facility doctrine perspective, the integrated nature of the facility and the labeling of a victim as a competitor rather than just a customer is not a particularly relevant limit concerning leverage activity. Arguably, denial is not harmful in either case because it cannot increase or maintain existing market power. Or, one could argue that denial harms downstream competition. Either way, distinguishing between the integrated and nonintegrated facility serves little purpose.

In addition, if denials only to competitors are prohibited, the strategy to avoid the doctrine is straightforward: deny first (even if that means dropping out downstream) and then integrate. A rule that distinguishes between denials to competitors and denials to noncompetitors could provide incentives for inefficient disintegration without improving the downstream market's ability to contribute to the efficient allocation of resources.

c. Agreement

In effect, every denial of access by a facility that is owned jointly by horizontal competitors is a horizontal agreement among competitors.¹⁵⁰ While most agreements among horizontal competitors are potentially anticompetitive and should be carefully reviewed, limiting the essential facility doctrine to collusive denials by jointly owned integrated facilities will not further protection of downstream competition. If the facility is essential, denial by agreement does not create a greater threat to downstream competition than does a single-firm denial.¹⁵¹ Restricting

¹⁴⁹ See Note, *Unclogging the Bottleneck*, *supra* note 1, at 471-72; Note, *Monopolist's Refusal to Deal*, *supra* note 40, at 1131.

¹⁵⁰ See, e.g., *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 608 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

¹⁵¹ *Lorain Journal* contains the argument that harm does not hinge on agreement. See *supra* note 85; see also Note, *Unclogging the Bottleneck*, *supra* note 1, at 470-71.

the rule to denials by jointly owned facilities may simply dictate the sale of facilities to single owners. After the sale the "collusion" will disappear, but the facility's ability to force the monopoly result in the downstream market will remain. Thus, the enforcement effort may not significantly improve the downstream competitive process.¹⁵²

Distinguishing between collusive and noncollusive denials might be justified on the grounds that collusive denials, unlike denials by single-firm facilities, closely resemble per se illegal antitrust activities. Agreements among competitors to harm other competitors of the colluding firms tend to fall into the group boycott category,¹⁵³ and at least some group boycotts have achieved a per se status (albeit an uneasy one), obviating the need to demonstrate harm from the activity.¹⁵⁴ A limited rule calling for per se treatment if a group of firms refuses to make their group-owned essential facility available to competitors seems fully consistent with a per se prohibition against other group boycotts. Recently, however, a jointly owned (but apparently not essential) input's actions that harmed a competitor of the owners received non-per se treatment by the Supreme Court.¹⁵⁵ Consequently, the consistency of

¹⁵² Posner argues that unilateral refusals to deal, in contrast to group refusals, should not be illegal. R. POSNER, *supra* note 61, at 211. His point is that the remedies for the two activities differ drastically. A group can be handled by telling the group not to agree, and then let each firm act for itself; no one is forced to provide access. The remedy is fairly clean and simple compared to requiring a single firm to provide access, which may require judicially supervised regulatory relief. *See infra* text accompanying notes 178-226. In the context of a jointly owned essential facility, however, "telling the group not to agree" involves either divesting the facility and giving each owner a little piece, or having the owners sell the facility to one owner who will not create agreements when making business decisions concerning the facility. Divestiture may not be feasible, and even if available it is a drastic, complex solution that could involve significant judicial supervision. Simply eliminating the agreement feature will do little to improve the competitive functioning of the downstream market in many cases because the monopoly will still sit upstream.

¹⁵³ A group of competitors at one horizontal level, manipulating a different horizontal level to harm a competitor and thus gaining advantage at the original level, resembles a classic group boycott. *See, e.g.*, L. SULLIVAN, *supra* note 5, § 83, at 231-32. Denial of access by a jointly owned essential facility closely fits the classic group boycott description.

¹⁵⁴ *See id.* §§ 84-85, at 232-41; *see also* *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 215-16 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 880 (1987).

¹⁵⁵ *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). In *Northwest Wholesale Stationers* expulsion of a company from a cooperative made up of horizontal competitors of the expelled company was not considered to be per se illegal. The joint facility was entitled to make some group decisions that might have harmed competitors. *Id.* at 296. For examples of horizontal agreements concerning price and output that were not given per se treatment, *see* *NCAA v. Board*

even this limited essential facility doctrine with group boycott rules perhaps may not last.¹⁵⁶

In any event, group boycott and horizontal agreement analysis can deal with the dangers inherent in collusive denials without resort to an essential facility doctrine. Joint ventures among competitors should be viewed with a skeptical eye because they can create opportunities for the competitor/owners to collude with respect to prices and output in the market where they compete. Accordingly, agreements by competitors who jointly own an input often may be harmful even if the facility is not essential. A nonessential facility cannot fully subvert downstream competition; thus, collusion may impede the competition that does exist. A finding that the facility is essential, however, does not transform an action by a joint venture into an agreement that inevitably harms downstream competition. Ironically, because an essential facility already maintains virtually complete power over the downstream market, the fact that a facility is essential may indicate that agreements are less likely to produce additional power.

The essential nature of a facility should be taken into account when evaluating whether a group denial warrants per se treatment. But the evaluation can best be done by avoiding the essential facility doctrine, as use of the doctrine disguises the leverage issue.¹⁵⁷ As with single-firm denials, the leverage issue should be confronted when determining whether a denial is “virtually always likely to have an anticompetitive effect”¹⁵⁸ in the downstream market.

of Regents of the Univ. of Okla., 468 U.S. 85 (1984); *Broadcast Music Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979), *reh'g denied*, 450 U.S. 1050 (1981).

¹⁵⁶ *Northwest Wholesale Stationers* also contains language suggesting that the limited essential facility doctrine discussed in this section will continue to be consistent. In rejecting the per se approach, the Court concluded that in the absence of power or essentiality it is not appropriate to conclude that denial will always be harmful. The case thus strongly implies that if a jointly owned facility does possess “market power or exclusive access to an element essential to effective competition,” a conclusion that denial of access is “virtually always likely to have an anticompetitive effect” is appropriate and the per se rule should apply. *Northwest Wholesale Stationers*, 472 U.S. at 296.

¹⁵⁷ At least one commentator has suggested that the “doctrine” language contributes to an unwarranted extension of the application of the essential facility concept beyond its proper narrow scope. See Boudin, *supra* note 1, at 397-403.

¹⁵⁸ *Northwest Wholesale Stationers*, 472 U.S. at 296.

3. Obtaining or Maintaining Downstream Power to Evade Upstream Regulation

Denials of access to downstream competitors could enable a regulated facility to make unconstrained price and output decisions in the downstream market. A rule prohibiting denials by a regulated facility that increase opportunities for regulatory evasion would further the anti-trust goal of avoiding market power increases. A "doctrine" to that effect, however, would have very limited applicability. The method of obtaining power will occur only when the upstream market is regulated and the downstream market is not. Even in those circumstances, denial will not inevitably increase market power.¹⁵⁹ In addition, regulation that precludes monopoly pricing but does not also carry a public interest mandate to provide service is likely to be rare.¹⁶⁰ Thus, the doctrine would make sense only as a very limited "regulated facility" rule.

Limiting a "regulated facility" rule to integrated firms appears appropriate, because a regulated facility without a downstream component cannot effectively extract monopoly profits from that market. Unfortunately, a nonintegrated firm could conceivably deny access and then integrate. Instead of making the act of integration after a denial illegal, it may be advisable to evaluate all denials by regulated firms rather than have a doctrine limited to integrated firms.¹⁶¹

C. Economically Harmful Denials That May Not Increase or Maintain Market Power

As the stadium example illustrates, an essential facility has an incentive to reduce output relative to a competitive output to maximize profits. Some firms may be turned away not as a strategy to increase upstream or downstream power, but simply because the facility can reap greater profits by selling at a higher price to a smaller number of purchasers. In similar fashion, denials that do not increase power may occur because price discrimination is unavailable.

These denials are examples of economically harmful (but not neces-

¹⁵⁹ Denial to 1 of 20 downstream firms, for example, may not increase a facility's ability to skirt regulation.

¹⁶⁰ The *Otter Tail* facts are not typical of most regulatory schemes. Most regulated industries maintain common-carrier obligations that require service at reasonable rates. See Note, *Unclogging the Bottleneck*, *supra* note 1, at 443. Recent deregulation of some industries may result in removing common carrier obligations, however, and increase the concern about denials for regulatory evasion purposes.

¹⁶¹ A limitation that the facility be jointly owned would serve little purpose. Regulatory evasion is a problem regardless of the ownership form of the facility.

sarily unlawful) exercises of currently existing power. They are likely to occur whenever a facility has market power and is unable to discriminate perfectly with respect to purchasers. The denials create deadweight welfare loss,¹⁶² resulting in the general misallocation of resources throughout society that the antitrust laws seek to minimize.¹⁶³

D. A Reformulated Essential Facility Rule

While the essential facility doctrine may not be particularly effective in rooting out increases or maintenance of market power, the doctrine could be restructured to attack inefficient denials. The benefits of such a doctrine would be to improve allocative efficiency and to contribute meaningfully to the competitive functioning of the downstream market.

Consider the following reformulated essential facility doctrine: A firm seeking access (or the Antitrust Division of the Justice Department) could make a successful essential facility claim by demonstrating that (1) the facility is essential;¹⁶⁴ (2) denial causes welfare-harmful output reduction or will increase or maintain the facility's market power; and (3) denial actually occurred. To show that the denial results in welfare-harmful output reduction, a firm (or the government) would have to prove that access would not interfere with present uses, that the facility could provide access "profitably" at a price considerably lower than the price offered, and that the seeker of access would purchase access at that price.¹⁶⁵ A "profitable" price is a price that covers all of the facility's costs of generating access, including a rate of return comparable to the return in competitive industries generally. If no such price exists, access cannot "practicably" be provided.¹⁶⁶

The claimant would need to demonstrate an actual denial, not merely that it paid a price higher than one that would enable the facil-

¹⁶² See F. SCHERER, *supra* note 6, at 14-21 for an explanation of deadweight welfare loss.

¹⁶³ See sources cited *supra* note 7.

¹⁶⁴ See *supra* text accompanying notes 102-108 (discussing how to define "essential").

¹⁶⁵ If a flat-out denial occurred and no price was offered, then the claimant must show a "profitable" price that the claimant would accept.

¹⁶⁶ It will not and should not be particularly easy to show that access could be provided at a lower price that would still enable the facility to cover long-run cost. Claimants need to be discouraged from using the doctrine to force an inefficiently low price for access. Firms that desire access but are unwilling to pay the costs of generating access should be discouraged from commencing suits. A rule imposing all legal costs on the loser might deter "let's take a shot at it, what do we have to lose" suits, while providing incentives to facilities not to price substantially above cost.

ity to earn a competitive return.¹⁶⁷ If the firm actually pays the monopoly price, distribution is affected; the purchasing firm gives up some of the consumer surplus it would have kept had the facility provided access at the competitive level. Harmful output reduction cannot be presumed, however, because a purchase still occurs.¹⁶⁸ When actual denial occurs, the result is an unambiguous distortion of allocative efficiency rather than just a division of surplus.¹⁶⁹

In this form, the doctrine would not require the claimant to show that the facility competes with the firm denied access, is jointly owned by competitors who denied access pursuant to an agreement, or has any other pernicious characteristics other than being essential. Monopoly pricing is likely to occur regardless of who or how many own the facility; it also creates inefficiencies regardless of the form of imposition.

If a claimant demonstrates that denial is welfare-harmful, a court should enforce a remedy that provides access in a non-welfare harmful way. An appropriate remedy will be to require that the facility owner provide access at the price the claimant demonstrated that the facility could profitably charge.

IV. SHOULD THE ESSENTIAL FACILITY DOCTRINE BE USED TO PROHIBIT OUTPUT REDUCTION BY AN INPUT MONOPOLIST?

Designing an essential facility doctrine to prohibit welfare-harmful denials of access regardless of whether the denial will maintain or obtain market power has some appeal. The doctrine would then confront

¹⁶⁷ If the purchasing firm can demonstrate that it purchased a smaller amount because of the higher price, there would be a denial as to the amount that would have been purchased.

¹⁶⁸ Firms that purchase an input at a monopoly price may pass that monopoly price on to the consumer. The net result may be harmful output reduction in the final product market even if the purchaser of the input is not inefficiently denied access. This harm could be attacked by eliminating the requirement that denial of access be demonstrated by the demander of the input. On the other hand, the broader rule would be tantamount to a rule that all above-cost pricing is illegal. An attractive feature of the narrower rule is that it limits the claimants to those who can demonstrate they were harmed with an inefficient result.

¹⁶⁹ Assuming that the antitrust laws are designed to place surplus in the hands of purchasers rather than producers, applying the doctrine to all purchasers facing a monopoly price could be appropriate. The underlying values of the antitrust laws may support such a distributional result. See Lande, *supra* note 100, at 74-77. In addition, to the extent that placing the surplus in the hands of a monopolist creates an inefficient incentive for people to squander resources to obtain monopolies, see *supra* note 102, applying the doctrine to all purchasers facing a monopoly price would contribute to reducing the inefficiency.

the real essential facility problem — the facility's monopoly power. The rule would attempt to eliminate all harmful denials, including predatory and regulation-skirting denials, without presuming that all denials are bad, without delving into intent or motive, and without requiring that distinctions be made concerning ownership forms and structures of the facility. It would attack the harm directly, rather than hoping that the indirect approach of trying to limit market power increases will do the job.

The contemplated approach, however, would force antitrust enforcement to boldly go where no antitrust doctrine has explicitly gone before. It would outlaw inefficient output reduction associated with an input monopolist's supernormal pricing of its input. A determination concerning whether the input monopolist's price is above a competitive level would be inevitable. The rule would also require enforcement to ensure that the input monopolist adheres to a more competitive level.

Some critics might consider the mere proposal to approach antitrust heresy. Determining a competitive price level in a monopoly industry is virtually impossible.¹⁷⁰ The courts, ill-equipped to make such determinations, would be transformed into regulatory bodies similar to public utility price regulators.¹⁷¹ Mistakes leading to drastically inefficient results might be frequent.¹⁷² Judicial involvement would hopelessly impede individual firms' pricing decisions¹⁷³ and free-trader abilities.¹⁷⁴ The successful competitor would be turned upon,¹⁷⁵ stripping away justly deserved monopoly profit, and creating disincentives for firms to perform efficiently. Firms might respond by shying away from innovation. The incentive to be the best would be distorted, thus tampering with the American way.¹⁷⁶

¹⁷⁰ See L. SULLIVAN, *supra* note 5, § 47, at 117.

¹⁷¹ R. POSNER, *supra* note 7, at 211; L. SULLIVAN, *supra* note 5, § 47, at 117-18; Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & ECON. 365, 388 (1970).

¹⁷² See *Byars*, 609 F.2d at 863-64.

¹⁷³ L. SULLIVAN, *supra* note 5, § 47, at 117.

¹⁷⁴ Dictum in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), suggests that even a monopolist has the right to choose its own customers and associates and cannot be forced to provide access. See *infra* notes 194-202 and accompanying text; see also Note, *Unclogging the Bottleneck*, *supra* note 1, at 460-62.

¹⁷⁵ 3 P. AREEDA & D. TURNER, *supra* note 38, ¶ 622a, at 59-60 (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945)).

¹⁷⁶ *But see* E. BURNS, *WESTERN CIVILIZATIONS* 329 (5th ed. 1958). Burns cites Aristotle's doctrines of the golden mean and the just price and Sir Thomas Aquinas' *Summa Theologica* as supporting the idea that "men who engage in business with the object of making as much money as possible are no better than pirates or robbers" and

On the other hand, if the purpose of antitrust laws is to improve allocative efficiency, one should not dismiss too quickly the idea of prohibiting all welfare-harmful denials. A finding that a facility is essential is a finding that competition will not correct harmful behavior for a significant short-run period. Unless the situation is dealt with, persistent economically harmful activity will distort the competitive process and the allocation of resources concerning products and services that use the facility as an input. The antitrust laws prohibit increases of market power at least in part to decrease the likelihood that welfare-harmful monopoly pricing behavior will occur; accordingly, attacking the welfare-harmful behavior itself seems worthwhile.¹⁷⁷ If buying a submachine gun is made illegal because the purchase significantly increases the chance that someone will be shot and killed, then making it also illegal to shoot the gun at someone is a rule worth considering. Somewhat perversely, antitrust law currently seems to perceive only the purchase as illegal.

A. The Remedy Problem Inherent in Essential Facility Situations Forces Consideration of the Price to Be Charged for Access

1. What Are the Terms for Access?

A significant reason to focus the essential facility doctrine on prohibiting an input monopolist from reducing output in a welfare-harmful manner is the lack of a limited yet adequate remedy for violations of the doctrine. If a plaintiff or the government shows that a facility has violated the doctrine by denying access, the remedy presumably is to require the facility to provide access. But at what price? At what level of service quality? In order to accomplish any significant benefit from the essential facility doctrine, a court must assign price and service levels for the access. If not, the controller of the essential facility will say "All right, if you insist. We will be happy to provide access at X price." The price X, of course, will be prohibitively high, thereby frustrating the remedy.¹⁷⁸

the argument that "every commodity has its 'just price,' equal to its cost of production. . . . To take advantage of scarcity to boost the price or to charge all that the traffic will bear is to commit mortal sin."

¹⁷⁷ From an efficiency perspective, only if the likely efficiency harms from the rule would significantly outweigh the likely benefits should the proposed rule be considered unworthy of antitrust pursuit.

¹⁷⁸ See *Aspen Highlands Skiing*, 472 U.S. at 592 (defendant made the plaintiff "'an offer [plaintiff] could not accept.'"); *Eastman Kodak v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927) (Kodak found to have refused to deal in spite of fact that it

A requirement to negotiate in good faith or to provide access at a "reasonable price" will not avoid the problem.¹⁷⁹ The facility will still be free to price the access at a harmfully high level until the purchaser complains and the court finds the price unreasonable. Even a monopolist acting in good faith cannot be expected to price below the monopoly price absent compulsion by a court or some regulatory body. Requiring the facility controller to negotiate or be reasonable without supervision may impose costs on both sides without improving the market's performance. The only way to confidently prevent abuse is to define "negotiation in good faith" or "reasonable price" to require access at a price approximating the competitive price.

2. A "Nondiscriminatory Access" Rule

One remedial concept that attempts to avoid the pitfalls of identifying and enforcing the appropriate access price requires the facility to provide access at nondiscriminatory prices. In other words, if the facility controller already provides access to some firms, then it must grant access to the denied firm at the same price it charges the other firms.¹⁸⁰ The solution seems fair because it enables all firms that desire access in order to compete to operate on an equal footing. Since the prices already exist, elaborate cost analysis is unnecessary. Administration could be relatively easy.¹⁸¹

offered to continue supplying distributor plaintiff, because price was considered too high to allow distributor to compete).

¹⁷⁹ See, e.g., *Terminal Railroad*, 224 U.S. at 44; *Byars*, 609 F.2d at 856 (the "facility has an obligation to give reasonable access"); *Aspen Highlands Skiing*, 738 F.2d at 1519 (citing *Byars*' language of "reasonable access"); *Hecht*, 570 F.2d at 992 (indicating that facility must be "shared on fair terms"); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 436-38 (2d Cir. 1945) (explaining that illegal price squeeze occurs if price for input is "higher than 'a fair price'"); *American Tel. & Tel.*, 524 F. Supp. at 1352-53 (fair and reasonable terms).

¹⁸⁰ Many essential facility and bottleneck cases describe the doctrine as requiring nondiscriminatory access. See, e.g., *Fishman*, 807 F.2d at 539; *MCI*, 708 F.2d at 1132; *Byars*, 609 F.2d at 858; *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 489 (1st Cir. 1982).

¹⁸¹ See Note, *Unclogging the Bottleneck*, *supra* note 1, at 485-86; Note, *Refusals to Deal*, *supra* note 14, at 1758. The need to control the quality aspects of the combined price and quality package offered by a facility, however, could swamp the appealing simplicity of a nondiscriminatory remedy. By discriminating in quality, a facility could completely discourage some access-seekers. See, for example, the efforts undertaken by the Civil Aeronautics Board to regulate the quality aspects of the airline computer reservation industry in the rulemaking cited *supra* note 107. In addition, when no other purchasers exist, there will be no price or service quality levels upon which to

Unfortunately, from an efficiency perspective the solution's appeal is somewhat illusory. The competitive environment in the downstream market may not be improved by imposing the remedy,¹⁸² because the facility is still able to charge monopoly prices for access as long as the monopoly price is uniformly assessed. As Posner points out, a remedy that requires access or membership on equal terms may result in nothing more than forcing the facility to share its monopoly profits.¹⁸³ In addition, integrated facilities interested in denying access can quite easily circumvent a nondiscriminatory access rule. The facility can charge itself a price that it knows no other firm can afford. The high price will not affect the integrated facility; what it pays out with one hand it takes in with the other. But the other demanders of the input will be unable to obtain any effective relief via the rule.

Finally, a nondiscriminatory access rule frequently does not meet the goal of achieving competition on equal or fair terms. The rule does not necessarily protect downstream competition, because an integrated facility can effectively deny access to all other firms. Even if the facility decides to sell to some firms, the "competition" between the other firms and the facility's downstream entity will not be on equal terms. The other firms will pay the price charged by the facility; while the controller will "charge" itself the same price, the controller actually incurs only the resource cost of generating access for itself.¹⁸⁴ The cost to the facility may thus be an amount far lower than the "nondiscriminatory" price that others are paying, leaving the facility with a substantial advantage in the downstream market.¹⁸⁵

The drawbacks to the nondiscriminatory access remedy¹⁸⁶ are cor-

base the remedy.

¹⁸² The nondiscriminatory remedy may be effective if the victims of the denial can use the importance of currently purchasing firms to obtain a lower price. If the facility cannot survive without some important buyers, those buyers may be able to negotiate a fairly competitive access price. A rule that the facility must provide nondiscriminatory access could work to give the less important purchasers the same deal, resulting in an access price for all purchasers fairly close to the competitive level.

¹⁸³ R. POSNER, *supra* note 61, at 208.

¹⁸⁴ When a facility provides access to itself the consumed resources are the true cost the facility incurs. All other amounts are simply transfers from one part of the company to another.

¹⁸⁵ The facility may not care about the "advantage" if it is successfully charging a monopoly price for access.

¹⁸⁶ Requiring an input monopolist to charge everyone the same price for access to the input may actually be economically harmful under some circumstances. The facility may simply charge one monopoly price and will be unable to reduce its price and increase output by supplying to some purchasers unable to afford the monopoly price.

rectable. But the correction involves determining the actual cost an integrated facility would incur by supplying itself and using that cost as a base for mandating the appropriate price for the firms seeking access. The result would be welfare-enhancing and nondiscriminatory. Such a determination, however, is virtually identical to determining what the competitive price for access should be.

B. The Perils of Judicial Price and Service Regulations

Commentators and jurists have made various arguments concerning the drawbacks of extending the focus of the antitrust laws to prohibit monopoly pricing and involving the judiciary in specific price and service regulation.

1. Monopoly Pricing Can Attract Entry

Sullivan points out that monopoly pricing may attract entry that over time can improve the competitive environment.¹⁸⁷ A rule eliminating monopoly pricing by a facility might discourage entry, but standing alone, this objection does not warrant discarding the rule. In the essential facility context, the concern for precluding entry is only a long-run concern; implicit in a conclusion that a facility is essential is the conclusion that for a significant period of time entry will not occur. In addition, firms may not always base their decision to enter on the basis of the profits earned and prices charged by incumbents.¹⁸⁸ Even assuming that the prices charged and profits earned by monopolists do attract entry, the entry may not be efficient. Firms that can survive only by charging a price considerably higher than the competitive price may be encouraged to enter. The resources spent by those firms may not be efficient if the firms are unable to provide the product at a cost lower than the incumbent's costs. The rule will not deter entrants who are able to produce profitably at a cost similar to or lower than the incumbent's cost.

Thus, the nondiscriminatory rule could result in reduced output.

¹⁸⁷ L. SULLIVAN, *supra* note 5, § 47, at 117.

¹⁸⁸ Postentry prices charged by the incumbent will not necessarily remain at the same level as pre-entry prices, as the incumbent may drop its price and increase output in response to the entry. Thus, the entrant cannot always rely on the monopoly prices and supernormal profit as an indication that entry will be profitable.

2. Monopoly Pricing Prohibitions Are Antihumanist and Turn upon the Successful Competitor

Sullivan also points out that in a market environment it is human nature to extract as much wealth as possible from a resource.¹⁸⁹ A rule contrary to that nature would be upsetting. The fact that a rule is upsetting to human nature does not render a rule unadoptable; most rules are upsetting to at least some portion of the population or they would not be necessary. If a rule significantly distorts desirable incentives, however, the rule may be harmful.

The concern to avoid punishing a successful competitor is a concern to avoid creating disincentives for firms to compete vigorously.¹⁹⁰ Efficient behavior need not drastically be deterred by a rule prohibiting an essential facility from reducing output in an economically harmful manner. The rule should deter only behavior that is designed to harmfully reduce output in pursuit of monopoly profits.¹⁹¹ Innovative activity that improves or invents a product should still be undertaken if a normal return will justify the investment. Innovation and investment that cannot be anticipated to lead to creation of an essential facility will be unaffected.¹⁹² Activities undertaken only because of anticipation of possible monopoly profits are not necessarily efficient and perhaps should be deterred.¹⁹³

¹⁸⁹ L. SULLIVAN, *supra* note 5, § 47, at 117.

¹⁹⁰ See 3 P. AREEDA & D. TURNER, *supra* note 38, ¶ 622a, at 59. Areeda and Turner also suggest that it may not be "fair" to attach penalties or stigma to a successful competitor. *Id.* ¶ 621d, at 58-59.

¹⁹¹ Sullivan acknowledges this point. See L. SULLIVAN, *supra* note 5, § 47, at 117. In addition, most consideration of whether or not a prohibition on monopoly will discourage incentives to improve contemplates dissolution rather than preclusion of monopoly profit. See, e.g., 3 P. AREEDA & D. TURNER, *supra* note 38, ¶ 622d, at 61.

¹⁹² See 3 P. AREEDA & D. TURNER, *supra* note 38, ¶ 622e, at 62 (arguing that disincentive created by condemning "mere monopoly" may not be significant in the case of persistent monopolies).

¹⁹³ Perhaps the lure of monopoly profits stimulates desirable innovation. This idea may be a premise behind the granting of patents. On the other hand, the relationship between monopoly rewards and desirable innovation is not clearly defined, and most attempts to stimulate innovation with a monopoly profit carrot involve recognizable costs. See *id.* ¶ 622c, at 60-61; Kaplow, *Patent-Antitrust Intersection*, 97 HARV. L. REV. 1813, 1823-39 (1984). Posner argues that significant harm results from expending resources in anticipation of monopoly profits. See *supra* note 102.

3. Interference with Free Trader Rights

Some may object that forcing an input monopolist to provide access on non-welfare-harmful terms in some cases might violate the “independent businessman’s cherished right to select his customers and associates.”¹⁹⁴ This “free trader” concept probably derives in part from dictum in *United States v. Colgate & Co.*,¹⁹⁵ which declared that absent “a purpose to create or maintain a monopoly”¹⁹⁶ the Sherman Act does not interfere with a businessperson’s ability to exercise discretion as to with whom she will deal.¹⁹⁷ The proposed formulation of the rule might require access even if the real reason for denial is that the facility owner does not like the purchaser.¹⁹⁸

As the Supreme Court has frequently recognized, however, any such free trader right gives way to the need to protect the competitive process.¹⁹⁹ Requiring access on non-welfare-harmful terms would significantly improve the downstream market’s ability to contribute to efficient resource allocation. As a result, while protecting the essential facility free trader — that is, protecting the ability of an essential facility to reject a profitable customer for reasons unrelated to profit-maximization — may be worthwhile, protection may be at odds with anti-trust efficiency values.²⁰⁰ Further, the free-market values supporting the free trader concept²⁰¹ do not strongly apply in the face of a persistent input monopolist.²⁰²

¹⁹⁴ *Aspen Highlands Skiing*, 472 U.S. at 600-01; see also Collin, *Refusals to Deal by Monopolists — Recent Decisions*, 14 AKRON L. REV. 549 (1981); Note, *Unclogging the Bottleneck*, *supra* note 1, at 460-62.

¹⁹⁵ 250 U.S. 300 (1919).

¹⁹⁶ *Id.* at 307.

¹⁹⁷ *Id.* The dictum is probably partly responsible for the general direction antitrust law has taken. Rather than focusing specifically on the harm caused by single-firm activity, the *Colgate* language refers to focusing on the gaining or retaining of power, or the purpose to do so.

¹⁹⁸ See 3 P. AREEDA & D. TURNER, *supra* note 38, ¶ 736, at 270-71. The dislike may be because the buyer is a jerk, the seller is a jerk, or both. In light of a monopoly supplier, however, it may be reasonable to assume the supplier is denying access for profit maximizing rather than for emotionally therapeutic reasons.

¹⁹⁹ See, e.g., *Aspen Highlands Skiing*, 472 U.S. at 600-01; *Lorain Journal*, 342 U.S. at 155.

²⁰⁰ The rule would not impose a duty to deal on anyone other than an essential facility. The rule does not require drastic change concerning the overwhelming majority of business decisions.

²⁰¹ See R. BORK, *supra* note 7, at 344; Note, *Unclogging the Bottleneck*, *supra* note 1, at 460; Note, *Monopolist’s Refusal to Deal*, *supra* note 40, at 1111-13.

²⁰² See Note, *Monopolist’s Refusal to Deal*, *supra* note 40, at 1113 (arguing that the

4. Judicial Inability to Administer the Rule

The major concern with a rule rendering inefficient denials by an essential facility illegal and requiring that access be provided at a competitive or non-welfare-harmful level is that the rule will be arduous to implement. Courts and commentators frequently express fear of turning courts into regulatory bodies that determine price levels a firm may charge.²⁰³ The argument is that courts are not competent to make the complex, ongoing determinations that might be necessary and that such extensive regulatory judicial involvement is inappropriate in an anti-trust context.

a. *Complicated Calculations*

Unquestionably, determining the appropriate price for access at any given time ordinarily will be rather complex. Courts are not necessarily incapable of dealing with the problem, however. Many courts in anti-trust cases have in fact undertaken "regulatory" remedial decrees, so the idea is not particularly novel.²⁰⁴ Given an inclination by some courts to get involved extensively in any event, articulating that prices must approximate a competitive level may simply serve the purpose of helping to define a "reasonable" price. Appointing a special master with expertise in economic theory and the industry in question to assist in dealing with a tough essential facility case may sometimes be an appropriate option to exercise.

The nature of modern antitrust analysis requires many complex economic determinations. Sophisticated economic analysis has already become the major decision tool for antitrust issues; overwhelming fear of

free trader concept is not appropriate for monopoly refusals to deal).

²⁰³ See R. POSNER, *supra* note 61, at 211; L. SULLIVAN, *supra* note 5, § 47, at 116-19; Posner, *supra* note 171, at 388; Note, *Unclogging the Bottleneck*, *supra* note 1, at 484. In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 159-60 (1948), the Supreme Court reversed a lower court decision in part because the remedy would enmesh the judiciary in day-to-day business operations. *But see* Note, *Refusal to Deal*, *supra* note 14, at 1755-57 (arguing that Paramount should not be considered to preclude enforcement of a duty to deal); *see also* *Byars*, 609 F.2d at 863-64; *United States v. Trenton Potteries*, 273 U.S. 392 (1926); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 349 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

²⁰⁴ See Posner, *supra* note 171, at 386-89 (indicating with dismay that a significant fraction of antitrust remedies are regulatory in nature); R. POSNER & F. EASTERBROOK, *ANTITRUST* 761-63 (2d ed. 1981). For examples of regulatory antitrust decrees, see *Terminal R.R.*, 224 U.S. at 411; *United States v. ASCAP*, 1950-1 Trade Cas. (CCH) ¶ 62,595, at 63,750 (S.D.N.Y. 1950); materials cited in R. POSNER & F. EASTERBROOK, *supra*, at 762-63.

this determination, which happens to focus directly on economic harm, is unjustified.²⁰⁵ Merger analysis, for example, often calls for sophisticated predictions as to whether the merging firms will increase their ability to maintain a price above their costs for any significant period of time.²⁰⁶ Proper assessment may require analysis of, among other things, the costs, capacities, prices, product durability, product homogeneity, and ability and willingness to enter pertaining to the merging firms, competitors, possible entrants, and foreign participants.²⁰⁷ As well, current merger guidelines call for a balancing of efficiency benefits and harms from a proposed merger, a precarious and speculative calculation at best.²⁰⁸ Similarly, proposed analyses of predatory pricing activity suggest involving the judiciary in highly complex cost analysis and possible remedial supervision.²⁰⁹ The necessary calculations for mergers and predation are not clearly less complex than assessment of whether an essential facility is engaging in welfare-harmful output reduction and a decision concerning the appropriate price for access.²¹⁰

²⁰⁵ If determining whether economically harmful output reduction has occurred and at what price and service levels harm would be significantly reduced really is too arduous a task, one must question the efficiency model's worth as applied to antitrust. The goal of that model is to minimize that harm. If economists and judges cannot directly identify and indicate how to reduce the harm, then efficient resource allocation as an underlying antitrust value should receive less emphasis.

²⁰⁶ See DOJ Merger Guidelines, *supra* note 5.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 22, 26, 30.

²⁰⁹ See Joskow & Klevorick, *supra* note 110, at 265-69, (reviewing various proposed predatory pricing rules). Various proposals would require a court to: determine an accused predator's short-run marginal costs (or use average variable cost as a proxy) and average total costs and decide if the predator's price was below the measures; evaluate whether a price cut was reversed within a reasonable time or was designed to recoup losses; and evaluate the capacity of the predator and determine whether it had increased its own capacity in the face of entry. *But see, e.g., R. BORK, supra* note 7, at 149-55 (suggesting that any rule prohibiting predatory pricing is likely to do more harm than good).

In effect, rules concerning predatory pricing are regulatory; they distort incentives to expand capacity, to reverse a pricing policy, or to compete by reducing prices. The rules perhaps create more risks than would a judicial regulation of an essential facility. No similar danger occurs when a firm found to possess market power that will not be eroded is discouraged from reducing output and charging a price significantly above cost.

²¹⁰ To the contrary, the merger analysis requires guessing — the academic term no doubt is “predicting based on probabilities” — what will happen in the future. Essential facility pricing regulation would be concerned only with finding harm that currently exists and correcting it rather than guessing whether a combined firm will have an increased ability to sustain a price above the competitive level.

Moving beyond the myopia of the antitrust world, the judiciary is frequently asked to make calculations similar to or more difficult than the calculation of an access price for an essential facility. For example, in the area of contracts, damage calculations frequently call for estimates of prospective amounts that would have been the benefit of a bargain had the deal not gone sour.²¹¹ The process may take into account estimates concerning costs, demand, profits, and reasonable rates of return for a business that never got off the ground.²¹² Similarly, the doctrine of unconscionability²¹³ requires a court to assess myriad factors, including prices and quality as well as the personal characteristics of the parties. Analogous to a decision concerning what might be a competitive price for access, unconscionability requires a court to decide whether a deal is so burdensome that it is not possible to presume that a rational person would have entered into it. The ramifications for the industries involved may be long run and significant,²¹⁴ yet courts routinely undertake the determinations.²¹⁵ It is hard to imagine that courts are incompetent to decide the appropriateness of prices when the United States Constitution virtually obligates courts to pass judgment on such questions by prohibiting takings for public use without just compensation.²¹⁶

²¹¹ See, e.g., E. FARNSWORTH, *CONTRACTS* 844-904 (1982).

²¹² *Id.*

²¹³ *Id.* at 302-19.

²¹⁴ See Alsop & Brandel, *Judiciary Assumes Role of Price Regulator*, ABA BUS. LAW. UPDATE, Vol. 7, No.1, Sept./Oct. 1986, at 4-6 (discussing the ramifications for banking and all industries of *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 702 P.2d 503, 216 Cal. Rptr. 345 (1985)); Leff, *Unconscionability and the Crowd — Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970) (critically pointing out extent of judicial involvement necessary to implement unconscionability doctrine and describing effects the rule may have on an industry).

²¹⁵ The judiciary has also regulated the fees lawyers charge their clients. See *United States v. Strawser*, 800 F.2d 704 (7th Cir. 1986), *cert. denied*, *Anderson v. United States*, 107 S. Ct. 1350 (1987); see also *United States v. Vague*, 697 F.2d 805, 809 (7th Cir. 1983) (Grant, J., dissenting).

²¹⁶ U.S. CONST. amend. V. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107 (1978) (Supreme Court grappling with whether Penn Central Building suffered diminution in value constituting a taking), *reh'g denied*, 439 U.S. 883 (1978). The Court concluded that no taking occurred, because the property could earn a reasonable return. *Id.* at 136. Evaluating the "justness" of compensation involves assigning a price for the worth of whatever was taken. In essence, the process determines the appropriate rate of return for a resource.

b. *The Appropriateness of Supervision*

The inevitability of the need for ongoing regulatory supervision is a stronger concern. A court may be able to identify an initial cost structure that the facility faces and determine appropriate price and quality levels on that basis. Unlike most tort and contract damage awards, however, the process may go on indefinitely until the facility is no longer essential.²¹⁷ The facility may attempt to alter its prices and/or quality levels, perhaps because its costs have changed or it is attempting innovation, perhaps in an attempt to dilute quality or extract high prices to discourage the firm seeking access. The access-seeking firm may protest. Disputes that parties cannot settle by themselves ultimately may have to be settled by the court that ordered access in the first place. (An imaginative remedy, however, might require arbitration by a trained industrial organization mediator prior to judicial determination.) The result may not be much different from a facility's applying to the court for a proposed rate increase, a circumstance that almost all commentators fear.²¹⁸

The regulatory nature of the relief in essential facility cases is highly undesirable and may prove unmanageable. Posner finds such antitrust remedies inadvisable for two reasons.²¹⁹ First, regulatory remedies are inconsistent with antitrust legislation because they admit that competition will not work. Second, they are a poor idea given the dismal record of regulation in this country and the fact that the federal district courts would be the regulators.²²⁰

If the goal of antitrust law is to allow resources to be allocated by competitive market conditions, regulatory relief in essential facility cases appears to admit defeat because it substitutes judicially imposed controls in place of the market process. But the goal of antitrust is not to achieve an allocation of resources uninfluenced by judicial decisions. The laws facilitate the competitive process at least in part to promote

²¹⁷ The judiciary frequently does become involved in ongoing supervisory matters, however, in areas such as child custody and support payments, probate, trusts, charitable contributions to nonprofit corporations, school desegregation, prison reform, and bankruptcy.

²¹⁸ See, e.g., *Paramount*, 334 U.S. at 159-61; *United Shoe Machinery*, 258 U.S. at 349; *Byars*, 609 F.2d at 863-64 (citing P. AREEDA & D. TURNER, *supra* note 38, (fear of judicial regulation)); AREEDA & HOVENKAMP, *supra* note 1, at 586, 608-09; R. POSNER, *supra* note 61, at 211; Joskow & Klevoric, *supra* note 110, at 215-16 (referring to fact that most predatory pricing commentators sought to avoid "instituting anything that resembles public-utility regulation"); Posner, *supra* note 171, at 388.

²¹⁹ R. POSNER, *supra* note 61, at 211; Posner, *supra* note 171, at 388.

²²⁰ See *supra* note 219.

efficient resource allocation. An attempt to minimize misallocations caused by a firm with power unconstrained by the competitive process is not necessarily a defeat. Rather, it is fully consistent with what is generally thought to be a major antitrust value.²²¹

If a facility is essential, the market in which it produces has become like a dead mouse on the kitchen floor. No one wants to pick up the mouse, and doing so may be repulsive to some, but it is probably best not to leave it there. Finding a facility to be essential means that the competitive process is an unreliable mechanism for correcting significant short-run welfare losses. The market requires some form of intervention, or those losses will persist.

The history of regulation may not be encouraging for the prospect of improving resource allocation through judicial regulatory techniques.²²² But it does not compel a conclusion that the judiciary's appropriate role is to ignore the harm and leave the solution to the legislature. Regulatory failures of the past may in part have been the result of the phenomenon of regulatory capture.²²³ Perhaps a federal court, less susceptible to capture, could impose a more streamlined and effective regime.²²⁴ Nor would judicial regulatory efforts prevent the firm, the industry, consumers, or other interested parties from encouraging the legislative process to intervene if they are appalled by judicially imposed remedies or think a better alternative exists. The alternative of not trying to constrain a facility is inconsistent with the values of the antitrust laws, absent a compelling showing that attempts to judicially constrain essen-

²²¹ The idea that the antitrust laws should be used to constrain firms with market power from charging excessive rates is not new. See L. SULLIVAN, *supra* note 5, § 47, at 116 ("The case law and legislative history both emphasize the dread of excessive prices, and the Act is unquestionably aimed at forestalling prices above competitive levels and resulting distortions in the allocation of resources." (footnotes omitted)); see also Blake & Jones, *supra* note 100, at 439; Kaplow, *supra* note 138, at 520-21.

²²² Posner, *supra* note 171, at 388.

²²³ See Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723-26 (1986), and the sources cited within, for a brief, clear description of capture theory. The basic notion is that public regulation will end up being "captured" by the private firms being regulated, and the regulation will end up benefiting rather than constraining those being regulated.

²²⁴ One of the features of capture theory is that public regulation can be manipulated to provide price supports, entry barriers, and guaranteed rates of return for the regulated industry. *Id.* at 725-26. A federal court, in providing an essential facility remedy, need not be involved with regulating entry. To the contrary, if entry occurs or is feasible, the facility may no longer be essential. Similarly, while some rate-of-return calculation will be involved, the return can be calculated with respect to access currently not being provided, without involving a guaranteed price level and rate of return for the entire facility.

tial facilities to less harmful levels would be unambiguously welfare-harmful.

c. Potential for Errors

Like any complex decision, the likelihood that the judiciary will impose the perfectly efficient solution for essential facility behavior is small. Courts might require essential facilities to provide access at inefficiently low prices. Resources may be squandered if the judiciary regulates nonessential facilities. Fears of prosecution and incompetent relief may distort some investment decisions.

The potential for error should be taken as a given. The competitive market does not rely on perfect price and output decisions by individuals to achieve an efficient allocation of resources;²²⁵ judicial solutions similarly should not be expected to approach perfection. The potential for error is not a determinative argument for rejecting the rule. Significant efficiency gains can be expected by precluding an input monopolist from monopoly pricing. The incentive to avoid judicial regulation may cause some firms with market power to reduce their prices and increase output. Raising the cost of monopoly behavior by creating fear of prosecution and judicial regulation can have significant positive deterrent effects; accordingly, the benefit from the rule should be greater than just the improved performance by the facility involved in litigation.

A rule requiring an essential facility to provide access at a price approximating a competitive price is not a rule outlawing supercompetitive pricing in all industries. Before a remedy is implemented, a claimant must demonstrate that the facility is essential and that it can practicably provide access without interfering with current uses.²²⁶ Both

²²⁵ Businesspeople must engage in the process of deciding the appropriate price, output, and service quality levels for their firms. They frequently miss the most efficient spot. Only over the long haul are the levels expected to gravitate towards efficiency.

²²⁶ Because the welfare harm is the same regardless of whether the product is an input or a final product, one should question why the rule should be restricted to essential inputs. While I perhaps should hide behind the "beyond the scope of the article" defense, there are reasons to restrict the doctrine. A call to eliminate monopoly pricing across the board could subject every business in every industry to significant uncertainty as to how to price its product or service. The administrative costs of such a rule and possible harmful behavioral distortions it could cause are far more drastic than a rule limited to essential facilities. In addition, denied access that represents harmful output reduction may be far easier to identify at the input level, where purchasers are cognizant of their costs and the effect of the input price, than at the final product level, where consumers are not likely to be aware of a monopolist's output reduction or able to prove that they are victims of the reduction.

are difficult to prove. The rule would not invite an antitrust suit from every purchaser who believes the price for the product she wishes to buy is too high.

CONCLUSION

The essential facility concept, which in varying forms tries to guarantee access to essential inputs, is not currently a coherent antitrust doctrine. From an economic perspective the efficacy of the doctrine is not enhanced by limiting its application to an integrated facility that denies a downstream competitor access or to a facility controlled by a group of downstream competitors who agree to deny to a another competitor. If the sole concern of antitrust law is to prevent increases or maintenance of market power, perhaps courts should abandon the doctrine. Denials that increase or maintain market power are already subject to attack by an antitrust doctrine bearing a different name, be it group boycott, monopolization, or attempt to monopolize.

Often prohibitions on vertical behavior by a firm with monopoly power (for example, "leveraging activity," refusals to deal, ties, exclusive dealing, mergers, resale price maintenance) fall under criticism that the behavior does not create new power and may be efficient. Critics argue that the real economic problem is caused by the monopoly, not by the behavior. The criticism, however, has not always adequately addressed the problem of whether to prohibit the activities because they are harmful without increasing power, and it seldom suggests what to do with the monopoly.

The market power possessed by essential facilities suggests that denial of access frequently will create economically harmful output reduction without increasing or maintaining market power. The essential facility dilemma is that the only meaningful remedy for these harmful denials requires someone, usually a poorly equipped federal court, to determine and enforce a "competitive price" for access. While such judicial regulation has unavoidable drawbacks, and deregulation rather than more regulation seems to be a popular agenda, using the essential facility doctrine to minimize economically harmful activities by facilities properly found to be essential should be given serious consideration. If the antitrust laws are to promote efficient resource allocation, ignoring the essential facility problem is to ignore one of the basic harms these laws seek to correct.